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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN - HAWAIIAN STEAM-
SHIP COMPANY, a corporation,
owner and claimant of the steamship
VIRGINIAN,

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COM-
PANY, LTD., a corporation,
Appellee and Cross-Appellant.

AMERICAN - HAWAIIAN STEAM-
SHIP COMPANY, a corporation,
owner and claimant of the steamship
VIRGINIAN,

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COM-
PANY, LTD., a corporation, as
bailee of a cargo of lumber consist-
ing of 3,563,011 feet, and for the
use and benefit of the owners and
insurers of said cargo,

Appellee and Cross-Appellee,
STRATHALBYN STEAMSHIP COM-
PANY, LTD., a corporation,
Appellee and Cross-Appellant.

In Admiralty

No. 2728

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F. D. Monckton,
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Brief of Appellee and Cross-Appellant.

HUFFER & HAYDEN,
W. H. HAYDEN,
F. A. HUFFER,

Proctors for Appellee and Cross-Appellant.

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STATEMENT OF CASE.

January 15, 1912, the cross-appellant herein filed its libel in a cause of collision in the District Court of the United States for the Western District of Washington, Southern Division, against the appellant herein, and in due course the steamship *Virginian* was seized and subsequently released upon stipulation and bond. Thereafter, the appellant answered and cross-libeled the *Strathalbyn*, which was attached and subsequently released upon bond. On February 8, 1912, the *Strathalbyn* Steamship Company, Ltd., as bailee of the cargo, the appellee herein, filed a libel against the steamship *Virginian* in said District Court, and the *Virginian* was duly attached and released upon the usual bond. Thereafter, the appellant herein, as owner of the *Virginian*, cited the *Strathalbyn* into the case, by petition, under the 59th admiralty rule, and the *Strathalbyn* was duly attached and subsequently released upon bond.

It appears from the pleadings herein that the *Strathalbyn* left Tacoma, Washington, for Australia, fully loaded with lumber, January 12, 1912, at about 6:15 p. m., by the bridge time.

The pleadings further show that the *Virginian* left Seattle, Washington, bound for Tacoma, with about 2,000 tons of cargo aboard, at about 6:40 p. m.; that the *Strathalbyn* proceeded on her voyage

to Robinson Point, where she took a course of northwest a half north magnetic for Pully Point; that the Virginian proceeded on her voyage to Pully Point, where she took a course of southeast a quarter south magnetic for Robinson Point (Duffy's evidence is that the course was southeast a half south (App. 1157); that the Virginian and Strathalbyn came into collision at about the hour of 45 minutes after 7, according to the Strathalbyn's bridge time. The evidence shows the collision occurred at 7:58 by the engine room time of the Virginian, and at 7:38 by the engine room time of the Strathalbyn, there being twenty minutes difference in the engine room time of the two vessels. When the Strathalbyn was swinging out of Tacoma harbor, she was met and passed, on the Strathalbyn's starboard, by the steamer Daring. When the Strathalbyn was rounding Brown's Point and had taken her course up Sound, she was met and passed, on the Strathalbyn's starboard, by the Indianapolis. When the Strathalbyn was rounding Robinson Point and was on her way towards Pully Point, she was overhauled and passed, on her starboard side, by the Indianapolis. When the Strathalbyn was rounding Robinson Point, she saw the Flyer and Virginian to the north of Pully Point, and observed the Flyer pass under the stern of the Virginian to starboard and overhaul and pass the Virginian, on the Virginian's starboard side,

in the vicinity of Pully Point. The Strathalbyn was making about 6 knots an hour. The Flyer was making 14 1-2 knots an hour. The Virginian was making 11 knots an hour. The distance between Robinson Point and Pully Point is 3 3-4 knots. The Flyer passed the Virginian at or before reaching Pully Point. The Flyer passed the Strathalbyn about midway between Pully and Robinson. When the Flyer overtook the Virginian, the Flyer blew one short blast, and directed her course to her own starboard, after the Virginian answered with one short blast. The Flyer passed the Virginian 200 or 300 feet to the Virginian's starboard. When passing the Virginian, the Flyer saw the Strathalbyn between Robinson and Pully Points and held her course, for a time, somewhat to the westward of her usual course until she was clear of the Strathalbyn. When the Flyer was something over half a mile from the Strathalbyn, the Strathalbyn blew one short blast, indicating she would pass the Flyer on the Strathalbyn's port. The Flyer answered with one short blast, and the vessels passed each other from 250 feet to a quarter of a mile apart. When the Strathalbyn was from 1,200 to 1,500 feet forward and off the Flyer's port bow, she blew one short blast to the Virginian and ported her helm, directing her course to starboard, the Virginian, at that time, bearing substantially dead ahead of the Strathalbyn,

and being in the neighborhood of a mile off, the Strathalbyn being about half way between Robinson and Pully Points when first signalling to the Virginian. At the time the Strathalbyn first blew and ported, the red and green lights of the Virginian were seen from the Strathalbyn. The Virginian failed to answer the Strathalbyn's porting signal. After giving the Virginian reasonable time to answer, estimated at about a minute, the Strathalbyn again blew one short blast to the Virginian and stopped her engines. The red light of the Virginian closed. The Strathalbyn blew another single blast, making the third to the Virginian, and backed full speed astern. The Virginian failed to answer the Strathalbyn's third single blast. The Strathalbyn sounded four danger signals, the Virginian then having approached until she was about 800 feet from the Strathalbyn. The Virginian blew three blasts in answer to the danger, this being the first whistle out of the Virginian to the Strathalbyn. Prior to the collision, the Strathalbyn had stopped so that she no longer had steerage way. But a few seconds elapsed between the Virginian's three short whistles and the collision. When the Virginian's three short whistles were blown, the pilot on the Strathalbyn observed the Virginian's propeller commence to back and throw the water under her counter. The Strathalbyn had swung from her course until she was

headed well into the bight to the eastward of Pully Point. The *Virginian* struck the *Strathalbyn* on the port bow, her stem crossing the *Strathalbyn's* stem, the *Strathalbyn* having a list of 6 degrees to starboard. The stem of the *Virginian* carried away the upper part of the stem of the *Strathalbyn* above the 29-foot mark, bent her port plating forward of the hawse pipe on the port side around to the starboard side, bent the stem and plating below the 29-foot mark to port, and coursed through the bow of the *Strathalbyn*, cutting out her fore peak, entering the sailors' quarters on her starboard side, injuring and killing some of the men in those quarters, and left the *Strathalbyn* just aft of her collision bulkhead, some 30 feet from her stem, on the starboard side. On the heavily laden *Strathalbyn*, the blow of the collision was severe, and caused her to list to starboard. Some aboard of her were jarred, and the pilot's arm was injured by being jolted up against the telegraph. The vessels were together a very short time, when the *Virginian* backed out of the wreckage. The *Virginian* swung very little to port, if any. The *Strathalbyn* swung, or continued her swing, to starboard.

The *Virginian* contends the side lights of the *Strathalbyn* were invisible and that the masthead light could not be seen, and that the *Strathalbyn*

was negligently navigated. The evidence shows that the stanchions, timbers 6 x 10 inches in diameter, holding the forward cargo of the Strathalbyn were higher than, and extended above, the side lights, which were located in their proper screens, just above the chart room deck. The Virginian, in approaching the Strathalbyn, alleges that when the Flyer was an eighth of a mile ahead of the Virginian, the Strathalbyn blew one short blast to the Flyer, which was answered by the Flyer; that, about a minute thereafter, the Virginian heard one short blast "from some point ahead and to the port side of the steamer Flyer"; that the Virginian then stopped her engines; that the pilot searched with his glasses for the Strathalbyn, but neither he nor the third officer, who was on the bridge, could see any lights of the Strathalbyn, and the lookout reported none; that, "from some point ahead," another short blast was heard, when the Virginian's engines were reversed full speed astern; that the pilot and officers continued to search for the object ahead, but could see no lights nor the outline of her, and then heard four blasts from a point ahead, which were immediately answered by three blasts from the Virginian, signifying "that her engines were going full speed astern"; that thereafter and within a few seconds, the Strathalbyn loomed out of the darkness immediately in front of

the *Virginian*, and the two vessels forthwith came into collision, "head-on, or nearly so", the *Virginian* being struck on her starboard bow, just abaft her stem, listing her to port; that the *Virginian* had been reversing full speed astern about two minutes or more before the collision, and immediately after the collision began backing from the *Strathalbyn*. The *Virginian* only heard two passing blasts from the *Strathalbyn* but heard the passing blast given by the *Strathalbyn* to the *Flyer* and the *Flyer's* reply. The *Virginian* contends that her silence and failure to answer the passing blasts signified that her officers could not see the *Strathalbyn's* lights. Just prior to the collision, the pilot and third officer were on the bridge of the *Virginian* and a lookout forward. After the telegraph signalled to the engines of the *Virginian*, her master came from his room out to the bridge. Prior to the collision, the first mate and pilot were on the bridge of the *Strathalbyn* and a lookout was on her bow. After the *Strathalbyn* blew to the *Virginian*, her master came on the bridge.

The *Strathalbyn* charges the *Virginian* with the following faults:

- (1) Having an insufficient lookout, and failing to see the *Strathalbyn's* lights;
- (2) Failure to answer the *Strathalbyn's* porting whistles;

(3) Failure to sound her danger whistle when the *Virginian* was in doubt of the course and direction of the *Strathalbyn*, after hearing the *Strathalbyn*'s passing whistle or whistles;

(4) In failing to stop and reverse earlier than within a minute before the collision;

(5) Taking a course to port instead of to starboard after hearing the *Strathalbyn*'s passing whistle;

(6) Failing to direct the *Virginian*'s course to starboard upon hearing the *Strathalbyn*'s passing whistles, under the rule that such a course would have been good seamanship under all the circumstances known to the pilot of the *Virginian*, and would have avoided the collision, even granting the *Strathalbyn*'s lights were invisible.

The *Strathalbyn* contends she was not in fault:

(1) Because her lights were proper;

(2) Because she blew the proper passing signals when the vessels were approaching;

(3) Because she ported her helm in accordance with the rule;

(4) Because she stopped when she saw the *Virginian* commence to swing her head to port;

(5) Because she reversed in accordance with the

rule when the vessels had approached so that there might be danger of collision if she did not do so;

(6) Because she blew her danger signal when it appeared that the *Virginian* would not change her course to starboard, and if she did not do so a collision would occur; and,

(7) Because the *Strathalbyn* had stopped so as to have practically no headway before and at the time of the collision.

The question of the damages to the *Virginian* and *Strathalbyn* has been settled by agreement between the parties.

The question of the liability of the *Strathalbyn* for damage to her cargo is contested by the *Strathalbyn* on the ground that, under the charter party, the charterer employed the pilot and relieved the *Strathalbyn* of all liability for loss or damage occurring by reason of collision and is estopped from recovering any part of the loss of the cargo from the *Strathalbyn* by reason of such provision, and, in the consolidated causes, judgment should be given against the *Virginian* only for one-half of the cargo loss, without right of the *Virginian* to recoup any part thereof from the *Strathalbyn*.

THE CROSS-APPELLANT ASSIGNS THE FOLLOWING
ERRORS TO THE HONORABLE DISTRICT COURT'S
FINDINGS AND DECREE, VIZ.:

I.

That the court erred in finding and decreeing that the collision mentioned in the pleadings herein between the steamship *Virginian* and the steamship *Strathalbyn* resulted from, or was caused by, the mutual fault of the steamship *Virginian* and said steamship *Strathalbyn*, and in refusing to find and decree that said collision resulted from the sole fault and negligence of the steamship *Virginian*.

II.

That the court erred in finding and decreeing that, in said causes, the damages to the steamer, demurrage and layup expenses and matters of such nature resulting from the collision mentioned in the pleadings, and costs, should be divided.

III.

That the court erred in refusing to allow, award and decree to the *Strathalbyn Steamship Company, Ltd.*, a corporation, libellant and claimant in cause No. 1036, the full amount of damages sustained by it as the result of the collision between said steamer and the steamer *Virginian*, together with interest thereon and its costs of said suit as prayed for in the libel herein.

IV.

That the court erred in finding the lights of the steamer Strathalbyn were not properly set and burning and visible to the Virginian.

V.

That the court erred in finding the angle of the approach of the Strathalbyn and Virginian was such that the red light of the Strathalbyn was not visible to the Virginian, and that it was hidden from the Virginian during the time the Strathalbyn was signalling to the Virginian.

VI.

That the court erred in giving more weight to the negative testimony of the witnesses that they did not see the lights of the Strathalbyn than to the positive testimony of witnesses that the lights of the Strathalbyn were visible from directly ahead prior to, at the time of, and after the collision.

VII.

That the court erred in finding that the stanchions holding the cargo on the Strathalbyn's forward deck did not tumble home and lean inboard from a perpendicular position, and that the port light could not be seen by sailors aboard the Strathalbyn from the deck of the Strathalbyn through the spaces between the stanchions.

VIII.

That the court erred in finding that the stanchions holding said deck cargo of lumber on the Strathalbyn leaned outboard slightly instead of inboard at the time of the collision.

IX.

That the court erred in finding that the stanchions obstructed the rays of the port light of the Strathalbyn so that the same could not have been seen on the Virginian from the angles at which the steamers were approaching during the time the Strathalbyn was signalling to the Virginian.

X.

That the court erred in finding that the Flyer in overhauling and passing the Virginian at Pully Point, when abeam, was two hundred (200) yards away from her.

XI.

That the court erred in finding that, because the rays of light from the side lights shone upon the stanchions holding the forward deck cargo on the Strathalbyn, the light was so obstructed at a point directly ahead that it was not visible from the Virginian.

XII.

That the court erred in finding that the Strathalbyn and Virginian were on like courses and struck head-and-head at the time of the collision.

XIII.

That the court erred in finding the Virginian was not at fault in failing to observe the masthead light of the Strathalbyn during the time the Strathalbyn was signalling to the Virginian.

XIV.

That the court erred in finding and decreeing that the Strathalbyn Steamship Company, Ltd., as bailee of the cargo of lumber recover more than one-half of the cargo damage and costs in the consolidated causes.

XV.

That the court erred in decreeing that the Strathalbyn Steamship Company, Ltd., libellant in cause No. 1036, be required to recoup the American-Hawaiian Steamship Company, claimant and cross-libellant in said cause 1036, for one-half of the cargo damage and costs decreed to be due the Strathalbyn Steamship Company, Ltd., as bailee, in cause No. 1052.

XVI.

That the court erred in failing to find and decree

that the charter party made and entered into between the charterer of the Strathalbyn and cargo owners saved and protected the Strathalbyn against the claim of the charterer and cargo owner from any loss or damage resulting from collision.

ARGUMENT.

Assignments of error I., II., III., IV., V., VI., VII., VIII., IX., XII. and XIII. all concern the visibility of the Strathalbyn's lights. If the lower court was correct in holding the Strathalbyn's lights obstructed in a way to be a factor in bringing about the collision, then the Strathalbyn is liable at least for half the damage. As in most collision cases, the testimony of the crews of the two vessels is such as to place fault on the other. The presumption is that the testimony of the crew as to what took place on the vessel to which they are attached is entitled to more weight than the testimony of the crew of the other vessel. Against this presumption is another presumption that careful and attentive navigators see what is visible and hear what is audible. The presumption of the truth of the testimony of all the crew of the Strathalbyn that her lights were brightly burning and visible, is brought in direct conflict with the presumption of the truth of the testimony of the lookout and officers of the Virginian that the Strathalbyn lights were invisible to them. Possibly we can

eliminate, therefore, the testimony of the crew of the *Virginian* and of the *Strathalbyn*, and seek for the truth in regard to the *Strathalbyn's* lights from disinterested eye-witnesses who testify they saw her lights at different and various times during the few hours from about 5:30 o'clock, when they were put out, until she arrived back in Tacoma, after the collision, in the early morning of the next day. If the side lights of the *Strathalbyn* were not simultaneously visible from directly ahead when her cargo of lumber was fully loaded, then merchants, traders and business men and ships' captains of Tacoma and Seattle are each and all guilty of perjury (and there are so many of them that it must be wholesale perjury), for they testify that both the *Strathalbyn's* lights were simultaneously visible from ahead, and if this testimony is false, there is no extenuating circumstance to excuse the positive and unequivocal statements of these witnesses.

There are really only two points that need to be determined in favor of the *Strathalbyn* to clear her entirely from liability:

First, that her lights were visible to the *Virginian*;

Second, that her navigation was proper when the *Strathalbyn* and *Virginian* were approaching.

Directing our attention to the testimony concerning the visibility of the lights, very briefly we will state the substance of the evidence of the various witnesses, in somewhat chronological order, from the commencement of the voyage of the Strathalbyn until her return to Tacoma.

1. The Strathalbyn was anchored off the Yacht Club grounds, at the head of the bay, in Tacoma, a little to the northeastward of the buoy maintained by the City of Tacoma for the use of vessels on such anchorage grounds. Capt. Strand was the keeper of a number of private yachts anchored off the Yacht Club house, which club house was located across a five hundred-foot waterway at the outer end of the Northern Pacific fill and about opposite the Commercial Dock and the wagon and foot bridge leading from Pacific Avenue across the railroad tracks to the Commercial Dock. It was Strand's duty to see to the safety of these private yachts, and to place riding lights on them. This he had done on the night that the Strathalbyn was preparing to leave for sea, and had walked up the steps from the roadway which passes the Foss boathouse, where he had left his boat, onto the bridge. When there, and about six o'clock p. m. (App. 466), he met a longshoreman, and they engaged in conversation about the Strathalbyn (App. 464). While so engaged in conversation, Strand

leaned his elbows on the railing of the bridge and was facing the water and looking at the Strathalbyn, which was lying north of him. The Strathalbyn was then at anchor and so swinging, through the influence of the wind and the tide, that, at times, she was heading directly for the bridge (App. 467). Her side lights were placed and her masthead light raised at about 5:30 p. m. (App. 307), and while the Strathalbyn was raising her anchor preparatory to going to sea. As the Strathalbyn swung, her red and green lights were visible to him, as well as her masthead light, and he saw both the red and green lights at the same time (App. 468). This is conclusive that the lights could be seen from directly ahead. Strand was about a quarter of a mile away, and at an elevation of about 40 feet above the water. This elevation is substantially the same elevation as the bridge of the Virginian (App. 834). While the Strathalbyn was so swinging at her anchor and was so observed by Strand, she was heading in a southerly direction, almost due south. There is not a word in the testimony attacking the veracity of Strand. His position of trust among the best people in Tacoma, caring for their property, at least should tend to make him a credible witness. At the time he testified, he was acting as mate for the United States Whaling Company on one of its whale-hunting vessels, and he has, since his testimony, received

honorable mention for bravery in rescuing and saving lives of shipwrecked people.

2. The next witnesses who refer to the Strathalbyn are those on the Daring, after the Strathalbyn is under way. It appears from the testimony of Wm. H. Smith, first officer (App. 1279), that, at the time he observed her lights, viz., when the Daring was half-way between Brown's Point and the Northern Pacific Dock and the Strathalbyn was about one-half a mile from and across the City Waterway, the Strathalbyn was swinging out of Commencement Bay (App. 1283-1284), crossing the bow of the Daring, which was coming from Brown's Point to land at the Northern Pacific Oriental docks. The starboard sidelight of the Strathalbyn was not seen by anyone on the Daring until abreast of that light (App. 952), nor did they notice her masthead light until within 300 or 400 feet of her (App. 970). Capt. McDowell did not notice if he could see the masthead light. It is not clear from the testimony of these witnesses that the Strathalbyn was not swinging to starboard and leaving her anchorage from a southerly direction when seen from the Daring, which was coming into Tacoma harbor on a south-southeast course, because all the Daring's crew do not place the Strathalbyn in the same position when first seen. McDowell places her well out towards the middle of the bay, about half way to Brown's Point. The Strath-

albyn's green light would not be visible to the Daring until the Strathalbyn had swung to a course of southwest, when her light would just commence to show 2 points abaft the beam, and, in order for the light to fully show, the Strathalbyn would have to be on a course of west-southwest. From this point, both the range and masthead lights would then be seen directly off the beam of the Strathalbyn. If, however, the Strathalbyn had finished her swing and was heading out towards Brown's Point, then the testimony of the witnesses from the Daring that they did not see the Strathalbyn's starboard and masthead lights until the Daring was abeam of the Strathalbyn cannot be taken seriously against the Strathalbyn. The lights were visible at a very much less angle. The testimony of Capt. Penfield, of the Indianapolis, is that the green light did not commence to fade until within three-quarters of a point off the Strathalbyn's bow (App. 982). Something must, therefore, have obstructed the lights from the view of the people on the Daring other than the stanchions. One of the witnesses from the Daring testifies that he judges the Strathalbyn was still engaged in hauling up the anchor, from the quantity of steam that was coming from her forward winch, and, as the wind, what little there was of it, was from a southwesterly direction, it would hold the steam so that it might obstruct the light (App. 962). We simply suggest this to

reconcile the testimony of the Daring's officers and the testimony of Capt. Penfield. The Daring's crew testify the lights were dim. This is so far in conflict with the actual seeing of the lights by others that we must also accept the explanation that the steam obscured the lights. The testimony of the Daring simply brings out, in a pointed way, the impossibility of drawing an inference that lights could not be seen from the testimony of witnesses that they did not see a light or lights. Capt. Penfield testifies that the green light did not begin to be obstructed until within three-quarters of a point off her bow, when it commenced to get dim (App.982), whereas the Daring's testimony is that it was not seen until some 10 points off her bow.

3. The next to observe the Strathalbyn was Capt. Penfield and the helmsman on the Indianapolis. As the Strathalbyn was coming out of Commencement Bay to round Brown's Point, her starboard side would be exposed to view to a vessel at Dash Point. When the Indianapolis was at Dash Point, the Strathalbyn was coming out from under the headland of Brown's Point, and was a mile or more away. Penfield, master of the Indianapolis, there saw her masthead light moving across the lights of the city. He testifies he did not see her green light until she was about a quarter of a mile off (App. 977), when he picked it up with the glasses, practically ahead, and that, in his

opinion, the Strathalbyn was heading off from his course a little to westward, and he saw the green light about a point and a quarter off his starboard bow, so that the green light would be obstructed to the extent of about a point and a quarter from ahead. He never was in a position to see the red light.

4. The next time the Strathalbyn was seen was by Capt. Penfield and helmsman on the Indianapolis' return trip to Seattle from Tacoma and after the Strathalbyn had passed Robinson Point, when she was overhauled by the Indianapolis about three-eighths of a mile north of Robinson Point (App. 984) and passed again on the Strathalbyn's starboard side. Here Penfield says the green light appeared brighter (App. 982) and was not obstructed to the same extent that it was at Brown's Point (App. 982), although, he testifies, the starboard light commenced to get dim when Penfield was about 3-4 of a point off the Strathalbyn's starboard bow (App. 982). He calls the masthead light dim, but the green light was brighter. The testimony of Penfield is corroborated by his quartermaster at the wheel, except that the quartermaster makes the green light invisible much earlier than Penfield and makes the lights much dimmer than Capt. Penfield.

5. If Capt. Penfield's testimony as to the dim-

ness of the lights is to be relied upon, then the court must entirely disregard the testimony of Mr. and Mrs. Ward, government lighthouse keepers on Pully Point. They saw the Strathalbyn's masthead light when the Indianapolis overhauled her at Robinson's Point. Capt. Penfield testifies that, when he overhauled the Strathalbyn, north of Robinson Point, he came up on her port quarter, changed his course to starboard and passed on the starboard side of the Strathalbyn (App. 993), and that no other ships were in the vicinity at the time this maneuver was enacted (App. 988). Mr. and Mrs. Ward testify they saw the Indianapolis make this maneuver, and that, at the time they saw the Indianapolis make this maneuver, they saw the masthead light of the Strathalbyn, which appeared brighter and larger than the masthead light of the Indianapolis (App. 200). These people had been on Pully Point three years (App. 199), and knew the regular boats plying between Seattle and Tacoma. At the time the Wards saw the masthead lights of the Strathalbyn and Indianapolis, the vessels were over three miles from Pully Point and so far that neither the side lights of the Indianapolis nor the side lights of the Strathalbyn were visible to the Wards. At the time of seeing the Strathalbyn and Indianapolis, the Wards noticed the Flyer and the Virginian to the north of Pully Point. It was the fact that the four vessels were

coming along in this manner that impressed the occurrence on the memories of the Wards. It cannot be said, in the face of this testimony, that the masthead light of the Strathalbyn was dim at the time she was approaching the point of this collision, which took place about 15 minutes after the Wards had seen the lights.

6. The next people to observe the Strathalbyn's lights were the navigators on the *Flyer*. When the *Flyer* was passing the *Virginian*, before reaching or when off Pully Point and before the lookout had reported the lights of the Strathalbyn, the *Flyer's* master, Capt. Burns, had seen the Strathalbyn's masthead light (App. 185) and another light aboard her, which he says was the range light, and kept his course to clear the Strathalbyn and navigated the *Flyer* in view of the bearing of the Strathalbyn's light from him which was substantially over his stem. At this time, the *Flyer* was to the westward and only about 200 or 300 feet from the *Virginian* (Cross-libel, App. 12-834). The *Virginian* was between the *Flyer* and Pully Point. When the Strathalbyn was seen by the Wards, she had taken her course to pass Pully Point to the westward. Therefore, the range of the Strathalbyn's masthead light was sufficient to show on Pully Point, and, being sufficient to show to the *Flyer* to the westward of the *Virginian*, brought the *Virginian* in range of her mast-

head light. Nevertheless, the Virginian's crew and lookout (with the exception of McLeod, her third officer, on the bridge,) testify that they did not then, nor at any time afterwards, before the collision, see the Strathalbyn's masthead light. They did not see that which was perfectly patent and visible to the navigating officers, quartermaster and lookout of the Flyer, as well as to some of her passengers. Capt. Burns testifies he did not notice the Strathalbyn's red light when passing the Strathalbyn. He attributes his lack of recollection of seeing the red light to the fact that he paid no particular attention to the Strathalbyn after he had shaped his course to pass her.

7. Passengers on the Flyer saw the Strathalbyn's lights. One was Capt. Milnor, an ex-sea-captain, who was getting along somewhat in years. Capt. Milner left the bright lights inside the cabin, and, getting on deck, observed the Strathalbyn as she was approaching the Flyer and saw two white lights upon her, one of which he testifies was the masthead light (App. 189). He does not recollect seeing the port light, and, in this respect, his recollection is the same as that of the officers and lookout of the Flyer. He attributes his difficulty in seeing this red light to the possibility that the cabin lights of the Flyer shining out along the line of his vision may have interfered with his so doing. He saw the masthead and green side light when the

Flyer returned to the Strathalbyn after the collision (App. 190). He was one of the witnesses who observed the Strathalbyn as the Flyer was proceeding on her way to Tacoma, and noticed then her port light and masthead light burning brightly (App. 584). Another passenger was a Mr. Beaumont. At the time he gave his testimony, he was a traveling salesman for a machinery house in Seattle. At the time of the collision he was installing an oil plant for the Milwaukee Railroad in Tacoma. Mr. Beaumont's experience prompted him to observe lights of vessels which he should be approaching at night (App. 719). He had been the manager of ocean tugboats and also collector of customs at Morgan City, La., and it was his duty, while so engaged, to see to the equipment and lights of vessels (App. 722, 723). He was sitting on the seat running around the forward part of the Flyer's cabin, to starboard of amidships, where he had an unobstructed view ahead. After the Flyer has passed the Virginian, (and four or five minutes before the Strathalbyn and Flyer exchanged whistles, he saw the Strathalbyn's masthead light, her red and green lights and the red light of Robinson Point (App. 717, 718). The Strathalbyn was a little to the eastward of the line between the Flyer and the red light of Robinson Point, at this time. Mr. Beaumont observed those lights for some little time, when, by reason of the approaching of the

vessels and their change of position, the green light disappeared (App. 718). Mr. Beaumont is a reputable man. Every detail of his statement is corroborated by some other witness either for the Virginian or Strathalbyn. Another passenger on the Flyer who was forward when the lookout reported the lights, and standing a little on the starboard side forward of the cabin of the Flyer, was Mr. Hofstetter. Mr. Hofstetter is a young, energetic merchant, conducting one of the largest harness manufactory and retail stores and gun and sporting goods stores in the City of Tacoma. He was returning from Seattle, where he had been directing the basket-ball squad of our local Y. M. C. A. in their contest with the Seattle Y. M. C. A.'s team. He testifies that, as the Strathalbyn was approaching the Flyer, and from a half to three-quarters of a mile off, he saw the Strathalbyn's masthead light and her red and green lights (App. 593-596). Nothing is given in the evidence to shake or disturb this statement of Mr. Hofstetter. His testimony is corroborated by others, and is consistent with the whole situation. His standing in the community is one of excellence. Mr. Beaumont and Mr. Hofstetter are absolutely disinterested from any standpoint. Have they wilfully perjured themselves? Their testimony is, without doubt, clean-cut, positive and indicates no doubt whatever. The occurrence of a collision necessarily impressed the

circumstances leading up to it on their minds. They remarked, at the time, that they couldn't understand how a collision could occur when all the lights were visible and so distinctly seen. In addition to the testimony of Mr. Beaumont and Mr. Hofstetter (who were the only passengers we could find who were on the forward end of the boat prior to the Strathalbyn and Flyer exchanging whistle to pass) was that of a Mr. McIntyre, a man familiar with seafaring life and one of the managers, among other things, of Sims & Levy, sailors' boarding-house men on Puget Sound. Mr. McIntyre had furnished some of the firemen for the Strathalbyn before the Strathalbyn left on this voyage. He is interested to that extent. His testimony is supported by the testimony of others. The court can have no reason to disregard it, unless the court disregards, as false, the testimony of ten disinterested witnesses together with the testimony of the Strathalbyn's crew. Mr. McIntyre has been in business in the Northwest for a number of years. He comes from one of the old-time families engaged in maritime work in this section of the country. If Mr. McIntyre's reputation for truth and veracity were not A1, the Virginian would not have had the slightest difficulty in discrediting him. Mr. McIntyre testifies that when the Flyer whistled and was passing the Virginian, he stopped reading his paper, got up and looked outside to see

what was going by. His business naturally interests him in the movement of vessels. He went back and picked up his paper and was busily reading it, when he heard the Flyer's whistle blow one short blast. He went out on deck. He observed the Strathalbyn approaching off the Flyer's port bow. There he saw her by seeing her masthead and red lights (App. 121) and heard the Strathalbyn blow a port passing whistle and another when off the Flyer's port quarter (App. 125). His curiosity satisfied, he went back into the cabin and sat down, when he heard the danger signals. Immediately went outside and saw the Strathalbyn and Virginian come together (App. 126). Mr. Swanson, one of the basketball team, happened to be outside on the Flyer's deck at the time these vessels were meeting. He noticed the Strathalbyn quite a time before she whistled to the Flyer, and probably a mile to a mile and a half away (App. 623). He testifies that he saw the Strathalbyn's red light burning as well as her masthead light from one and a half to two miles before the Strathalbyn reached the Flyer and when the Strathalbyn was passing the Flyer (App. 623).

8. The next witness who saw any light aboard the Strathalbyn before the collision is McLeod, the third officer on the Virginian. He testifies he saw the masthead light on the Strathalbyn before the

collision, when just on top of the Strathalbyn (App. 130), too close to avoid the collision (App. 892). This is his conclusion. This admission that the Strathalbyn's masthead light was seen burning prior to the collision by one of the Virginian's navigating officers on the bridge makes one ask: Why was it not seen by any other officer on the bridge prior to the collision or by the look-out, who was 200 feet nearer than McLeod? McLeod was not using glasses. Duffy says he (Duffy) was, in an attempt to pick up the Strathalbyn. The repeated whistles of the Strathalbyn directed attention to the position of the lights. We cannot believe they were not seen much earlier by others on the Virginian.

9. The next testimony that the Strathalbyn's lights were burning comes from the Virginian's crew witnesses. They all state that, immediately after the collision, and when the Strathalbyn was about abeam of the Virginian, they saw the Strathalbyn's red light (App. 130, 851, 872, 892). McLeod says, in answer to Mr. Hughes' questioning: "Was it bright or dim? A. It was not very bright, but it was a light we ought—" when he was interrupted by Mr. Hughes with the question: "Q. Bright enough to be seen?" to which he answers: "A. I could not say how far you could see it." (App. 132). When later asked by Mr. Hayden

how far he estimates he could have seen the Strathalbyn's red light, McLeod parries the question by answering: "A. Well, it appeared to me a light that you could see a little distance without being obscured." (App. 132).

10. The next to see the Strathalbyn's lights is the *Flyer* again, which, immediately upon the collision occurring, swings to port and comes up to the damaged vessels as quickly as it can. As it approaches the Strathalbyn and gets into a position 2 points abaft the beam, her officers and passengers see the Strathalbyn's green light burning, as well as her masthead light (App. 181, 818, 820, 821, 822, 190, 595, 625, 721). The *Flyer* started back to the vessels when the danger signal blew.

11. The next time the Strathalbyn's lights are seen by a number of people is when the *Flyer* has hauled away from the Strathalbyn and is on her voyage again to Tacoma. Naturally, all the excitement of the collision is not over. The passengers on the *Flyer* still have a lingering interest in the two vessels left behind. They stand, as the *Flyer* draws away, and watch the Strathalbyn and *Virginian*. The Strathalbyn has swung her head around to port, describing a circle, and is headed in for the land under Robinson Point. The *Flyer* is headed for Robinson Point. The people on the *Flyer* again see the Strathalbyn's masthead light,

on some of them her port and starboard lights simultaneously (App. 584-684).

The next to see the Strathalbyn's lights are two operatives of the small gas boat Salmora. They approach after the Flyer has left the Virginian and Strathalbyn and while the Strathalbyn is swinging from her course towards Seattle to go on the beach at Robinson Point. They saw the Strathalbyn's port light about a quarter of a mile away (App. p. 922), and did not see her masthead light until abreast of the Strathalbyn. They say they were very dim oil lights, and when the Strathalbyn opened her red light she was heading towards Robinson Point (App., p. 1088); that the masthead light looked like it was shining over the Strathalbyn's side (App., p. 1089); that they didn't see the Strathalbyn's masthead light until they were about abeam; that it appeared to be dim and smutty; that they could see it 300 feet. They think the red light would have been visible from half a mile to a mile (App., p. 1103); that the masthead light on the Strathalbyn could have been seen from dead ahead (App., p. 1108). These observations were made after the collision. This was at the time the Flyer was leaving the Strathalbyn. Witnesses on the Flyer saw the lights so condemned by the Salmora witnesses until Robinson Point cut them out. The surmise and con-

clusion of the Salmora's witnesses are refuted by the actual observation by the Flyer's witnesses; and Capt. Penfield's conclusion that the Strathalbyn's masthead light was dim is refuted by the actual observation of the Wards. The conclusion of these witnesses must give way to the superior evidence of actual observation.

And now the Strathalbyn is left alone, in company with the Virginian. The Virginian follows the Strathalbyn from the point of the collision until the Strathalbyn gets in the vicinity of Robinson Point, when the Virginian hauls ahead for Tacoma. Yet, during all this time, the officers, pilot and crew of the Virginian (that is, so many of the crew as are called, and only the lookout, pilot, first mate and master are called on this point,) all testify that they did not see the port light of the Strathalbyn, that they saw a light which they thought was the masthead light, but, on subsequent consideration, were doubtful of the fact; that all the lights they did see were dim, swinging, flaring up and fading out. This is undoubtedly accounted for by the fact that the Virginian was following the Strathalbyn and did not pull ahead of her until the Strathalbyn rounded in to the beach at Robinson Point (App. 1165-1166). Every other witness says the Strathalbyn's lights were steady, did not flare up or go out. Oil lights

surely don't act that way, for if they go out there is no way to immediately light them.

12. The next seen of the Strathalbyn's lights was when Mr. Macquarrie, Mr. Leach and the crew of the launch, which went out from Tacoma to the vessel after word had been conveyed to them that there had been a collision in which the Strathalbyn figured. Of course, these people on the launch were searching for the Strathalbyn. They were intent on picking her up. They didn't know where she was. When the launch got somewhere between Dash Point and Brown's Point, a red light was seen in the direction of Robinson Point, which red light was large and bright. Mr. Leach and Mr. Macquarrie were on the forward end of the launch, looking for ships' lights. They spoke about the red light, and thought, at first, that this red light was Robinson Point light. On closer observation, they noticed the masthead light above it, and then knew the lights were the lights of a vessel, and directed the course of the launch to the vessel (App. 633, 636, 648). The launch-boys all testify that, during this passage from Dash Point to Robinson Point, they saw the masthead light of the Strathalbyn and her red and green lights simultaneously (App. 114, 118, 134). Mr. Leach and Mr. Macquarrie both testify that they do not believe the Strathalbyn was so headed at that time that these lights would have been vis-

ible. They do not recollect seeing the green light and red light at the same time when the vessel was off in the direction of Robinson Point. But, be that as it may, Mr. Leach, with the launch-boys, left the Strathalbyn in the vicinity of Dash Point and came with the launch to put a light on the Milwaukee Dock (App. 637, 649), it being surmised at the time that the Strathalbyn would not remain afloat, and that they would run her on the mud flats near the Milwaukee Dock. After placing a light and one of the launch-boys on the Milwaukee Dock, Leach returned to the Strathalbyn, and saw her as she was coming around Brown's Point (App. 649). When in the neighborhood of a half a mile away, the Strathalbyn swung into such a position that she was directly head on to the launch, and Leach then saw both the red and green light of the Strathalbyn simultaneously (App. 649, 650). After reaching the Strathalbyn, Leach was informed that it was not necessary, in the opinion of the pilot, to place the steamer on the mud, and he was directed to take the launch, pick up the boy on the Milwaukee Dock and the light, and to go to the buoy in the bay and take a line with which to make the Strathalbyn fast to the buoy. He did so; and, when upon the buoy and the Strathalbyn was bearing down upon it, he again saw both the red and green light on the Strathalbyn simultaneously (App. 650).

When the Strathalbyn reached Tacoma harbor, the men on the launch wanted to see the damage. Cawley, the launchman, tied her up alongside the port side of the Strathalbyn, under and close to her port light, and came aboard the vessel (App. 136). When Cawley was 30 or 40 feet forward on the forward deck cargo of the Strathalbyn, the thought occurred to him that his masthead light might be fouling the ship's boat which had been put over the side of the Strathalbyn and was hanging in the davits. He, therefore, went to the port rail (a board nailed to the stanchions) and leaned over and looked outside the stanchions at his launch and there saw the red light on the outside of the stanchions (App. 136). This shows clearly that the light could be seen directly ahead. The vessel narrows going forward.

Another like instance: Mr. Semruk, a sailor, came out of the forecastle after the collision. He saw one of his companions, injured, leaning over a board rail nailed to the port stanchion. He put his arm around his mate's shoulder, and, as he asked his companion's condition, was facing aft, with head outside of the stanchions. He then saw the red light distinctly (App. 387). These two last-mentioned instances, as well as the instances of the men who were on the small launches or boats at a lower level than the light, show that the crew

who were coming aft on the Strathalbyn and saw the red light between the stanchions were not necessarily looking over the same, as suggested in the opinion of the lower court. There have been so many people who testified to actually seeing the light outside of the stanchions and from directly ahead that it seems the testimony preponderates that it could be seen from directly ahead, notwithstanding any confusion about measurements of the vessel and speculation as to the possibility of the stanchions obstructing the light.

As the Strathalbyn moved from Tacoma to the point of collision and back again, her bridge officers were looking at the lights or their reflections and knew they were burning. The Strathalbyn's lookout, Cameron, reported the lights every half hour (App. 315). He observed the side lights by looking over each side of the vessel from the forecastle head outside of the stanchions. No one was in a better position to know that the lights were unobstructed than Cameron.

Were the Strathalbyn's lights dim? This is an attack made upon them by the Virginian. Their defense is double-headed: First, the lights were obstructed; second, they were dim whether obstructed or not. On the latter point, let us group the witnesses. The Indianapolis condemned them to the extent of saying they were not very bright.

The Salmora says they were very, very dim. The Virginian says they were dim and flickered and flared up and went out. Does this testimony preponderate? We assert it does not. Capt. Penfield, of the Indianapolis, saw the Strathalbyn's masthead light a mile or a mile and a quarter away and as soon as it was visible when rounding Brown's Point. The Wards saw the Strathalbyn's masthead light when she was rounding Robinson Point with the Indianapolis, and it was brighter than the Indianapolis' light. All the navigating officers of the Flyer saw the masthead light burning brightly when the Flyer was rounding Pully Point and the Strathalbyn was off more than half-way to Robinson. The passengers on the Flyer saw the masthead light of the Strathalbyn burning brightly. A number of the passengers on the Flyer saw the Strathalbyn's red light burning brightly before she passed the Flyer. Two of the passengers on the Flyer saw the Strathalbyn's green light burning brightly as the Strathalbyn was approaching the Flyer. Every person on the Flyer saw the Strathalbyn's green light and masthead light burning brightly when the Flyer came back to the Strathalbyn after the collision. All the witnesses who testify to observing the Strathalbyn's lights after the Flyer drew away from the Strathalbyn testify the lights they saw were burning brightly and steadily. The only witnesses produced by

either the Strathalbyn or the Virginian who testify that the lights were not steady are the master, pilot, third officer and lookout on the Virginian. None of the rest of the Virginian's crew was called to testify to this phenomenon, directly contradicted by every other witness in the case. There is no evidence at all that the Strathalbyn's lights flickered, went out or were smoky until after the collision. Penfield does not say that the masthead light flickered, flared up and went out. None of the witnesses testify that the red or green light flickered, flared up or went out. Not a witness supports Duffy, Green, McLeod or the Virginian's lookout in their uncertainty as to whether the light they saw aloft was the masthead light or not. On the contrary, every witness, passengers and all, had not the slightest difficulty in identifying the masthead light of the Strathalbyn. The testimony that the masthead light was dim, flickered up and faded out and could not be distinguished from lights on deck, if it is intended to express a condition at the time of, or before, this collision, is as false as an untruth can be, for the testimony of disinterested witnesses preponderates so enormously against the lights being dim or unsteady at, and just prior to, the collision, that it is impossible to draw any other conclusion than above expressed.

The next day, after the collision of course, the newspapers had an account of the collision, and

Mr. Strand, who had seen the lights the night previous, from the Commercial bridge, having read the newspaper reports, was curious enough to want to see the nature of the damage to the Strathalbyn, and he went out in his rowboat and looked around the bow of the Strathalbyn at this damage. He was the man into whose boat Dyell, the sailor who was killed and encased in the folds of the Strathalbyn's plating, was placed after he was discovered and removed. He looked at this damage, speculated how it could have occurred, lined up the light boxes with the stanchions and saw that everything was clear (App. 482, 484).

A collision having occurred, the next step was to obtain evidence that the stanchions did not obstruct the lights. Therefore, a photographer was engaged to place himself directly ahead the Strathalbyn and take a photograph of her, which would show her stanchions and show the light screens, and depict the true situation. In order for the photographer to get into a position where he could take this picture, the vessel having then been hauled onto the mud flats from the buoy, it was necessary to hire a launch, and this launch was hired, and Capt. Burley went along with the photographer, and they tried to place the launch directly ahead of the Strathalbyn and take a picture of her stanchions and light screens. It was misty and windy,

and the launch was bobbing about and drifted some, and, during the interval between the time the photographer could sight from directly ahead of the Strathalbyn and the picture was taken, the launch drifted a little to the port bow. The lens had become filmed with a haze and the picture was not clear. It has been introduced in evidence with the explanation of the photographer who took it and of Capt. Burley, who was present when it was taken. By the time the picture was discovered to be not clear, the deck cargo had been removed. There was no way of reproducing the scene, except through the aid of verbal testimony of the photographer and Capt. Burley. Both testify that, from a point directly ahead of the Strathalbyn, the light screen was visible, projecting 12 or 14 inches outboard of the stanchions (App. 561, 575).

The next person to investigate the question of the stanchions obstructing the light was Capt. Fowler. He entered the Strathalbyn from a launch, through the damage in her bow, went onto the forecastle head, walked along the cargo on the port side of the Strathalbyn, stepped into the port light box. He also was curious to see if the lights could have been obstructed by the stanchions. He glanced forward, standing in the light box, using the outer edge of the block in the forward end of the light box as his sight. He estimates, and is firm in his

belief, that the stanchions protruded two degrees out beyond a line parallel with that block and the keel. This is the only eye-witness produced by the Virginian. Capt. Fowler was one of the surveyors who prepared the specifications for the repairs to the Virginian. He was on that job until superseded by Mr. McGregor. The writer of this brief has a great deal of respect for the integrity and honesty of Capt. Fowler, and does not believe that he would wilfully misstate any fact. Capt. Fowler was standing up at the rear end of a box three feet long, sighting over a block in the forward end of that box. His eye was directed down and was not on a level with the block or the point on the stanchions on a level with the block. The inside of the Strathalbyn's forward main-deck rail is about 8 inches outside the outer edge of the block. The stanchions were slanted in-board, or tumbled home. Capt. Fowler, looking down across the end of the block, necessarily saw the stanchions below the point on a level with the block. Consequently, he naturally assumed that the stanchions extended out so as to obstruct the light at an angle of 2 degrees. The first stanchion was located some 8 feet forward of the house, and the forward end of the light box was located some 2 feet aft of the forward edge of the house, and the light was located 3 ft. 6 in. aft of the forward end of the light box (App. 521).

The first stanchion was some 13 feet or more forward of the light and 9 or 10 feet forward of the block. The obstruction of 2 degrees measured from the block would not amount to 3 1-2 inches and was so small that the outside of the light projected beyond a line parallel with the outer edge of the stanchion and the keel. The course of the Strathalbyn was changed to starboard on meeting the Virginian. This stanchion could not have obstructed the light as the vessels were approaching each other. The testimony of Capt. Fowler, however, happens to be checked, as it were, by the testimony of Mr. Leach, who sighted aft along the stanchions, on the port side, from the forecastle head, and also by the testimony of Capt. Burley, the photographer and Capt. Strand, who all did the same thing, and they all testify that the light screen was not obstructed; that the rays of the light in it would show directly ahead, thus further corroborating the testimony of all of the witnesses who testify that they saw both the port and starboard light at the same time.

The American Trading Company loaded the Strathalbyn. They had her under charter. Mr. Leach is their supercargo, and Mr. Waadne their foreman of stevedores. Mr. Waadne had charge of putting up the stanchions to hold the cargo on the forward deck. He testifies they had a tumble home of a foot (App. 706). He knows it for two

reasons: First, because he sighted along the stanchions upon the house of the Strathalbyn, and remembers tumbling them home; and, second, because it is his universal custom to tumble the stanchions home, in order to prevent them being spread outboard and to make them stronger when the ship is at sea. An individual custom, supported by a recollection of this particular case (App. 701), it seems should sufficiently prove the fact, in the face of no contrary testimony. The testimony as to how the stanchions were placed by Waadne is corroborated by Leach (App. 651).

The testimony of Capt. Green discloses that he got into a small boat and went around the Strathalbyn in the morning of the day after the collision and looked at her general arrangement; that the Virginian's representative, Mr. Fowler, came over from Seattle and was aboard the Strathalbyn on the morning of the day after the collision. If the real reason for this collision was the obscuration and impossibility of the Virginian's officers to see the Strathalbyn's side lights, it seems marvelously odd that they did not take pictures of the stanchions obstructing the lights. The Strathalbyn took them to show the lights were unobstructed. It was just as easy for the Virginian to take them to show the lights were obstructed. It is impossible to believe that a man of Capt. Green's initiative, knowing

that the collision would bring forth an investigation before the Steamboat Inspectors which would involve his license, should personally neglect the opportunity to clear himself when it only required the operation of taking a snap-shot picture while he was out in the rowboat to produce irrefutable evidence to support his innocence. Not until after the Strathalbyn has gone to sea, has returned to Puget Sound, has been loaded in a different manner, by a different stevedore, by a different company, does the Virginian produce photographs for the purpose of showing the Strathalbyn's lights were obstructed. These photographs were objected to on the ground they did not show a similar condition. They are taken by a camera which was so broad at the base that it could not set in the light box without extending the lens several inches farther outboard than the outer edge of the block in the forward end of the screen. A picture so taken naturally magnifies the outboard appearance of the stanchions. The whole attempt is so unfair that we do not anticipate the court will justify the effort by considering the testimony as having any bearing on the case.

Could the port side light be obstructed and at the same time be seen through the stanchions as well as be seen shining upon the first stanchion forward of the house? On the Strathalbyn, the light screens were so arranged that the red light could be seen

by a man on the forcastle head when standing on the port side or end of the windlass there located (App. 323). The light had an overflow inboard to that extent. The stanchions were 6x10, with the broad side against the rail. The distance between the light screen blocks was 47 feet $3\frac{3}{4}$ inches. Half this distance is, say, 23 feet 8 inches. Say the base of the windlass is 16 feet 7 inches (App. 543). The length of the forward deck is 101 feet $9\frac{1}{2}$ inches (App. 530). The windlass was located well forward on the forecastle deck, so that the distance between a man standing at the poop of the windlass and the light screen would be substantially 125 feet, and, when so standing, he would be, say, 9 feet to port from the keel line of the ship. The line of light would, therefore, be drawn from this 9-foot point to the outer edge of the block in the end of the light box. If the stanchion was outside of that line the light would show full upon it. The stanchion was just outside of that line; so that the light did show full upon it, and yet was not obstructed from a point directly ahead. Figures corroborate the testimony of Mr. Cameron (App. 323).

“Q. Could you see the side lights when standing on the poop of the windlass? A. Yes, sir, I could see them showing inside the first stanchion by standing on the poop of the windlass.

- Q. Showing inside the first stanchion? A. Yes, sir.
- Q. The poop of the windlass is in the center? A. No, the barrel of the windlass is the poop.
- Q. Where is that? A. That is on the side of the bow.
- Q. How much is it to one side of the bow? A. I could not judge.
- Q. What is the outside width of the drums, from one to the other? A. I could not tell; I never measured.
- Q. And from that point you could see the side lights? A. Yes, sir.
- Q. Looking back inside the stanchions? A. Yes sir.
- Q. Did you notice them there that evening repeatedly, from that point? A. Yes, sir."

With the above mathematical demonstration, verifying Cameron's testimony, based on actual vision, we submit that the Honorable District Court was in error when he concluded that the stanchion must be outboard of the light screen in order for the rays of the light to shine upon the first stanchion. Capt. Beecher and the other officers on the bridge knew the port and starboard lights were burning prior to, and at the time of the collision, by reason of this reflection or casting of the rays of the light upon the first stanchion.

Referring to the testimony that was introduced in evidence to show that the Strathalbyn's lights were obstructed—a very stupid mistake occurred in connection with the measurements of the Strathalbyn. It was the intention of counsel for the Virginian and for the Strathalbyn to avoid any conflict of testimony as to the measurement of her physical characteristics, the principal measurement being, of course, desired between her light boxes or lights and between her bulwarks just forward of the house. This was a simple measurement about which there should have been no difficulty. For the purpose of getting these measurements accurate and having them certified to, the Virginian selected Mr. Walker as its representative, and the Strathalbyn designated Mr. Jack, who had been making the repairs for the owners of the Strathalbyn, she being then in dock at Esquimalt, B. C. The blue print was stricken off. Prior to Mr. Jack and Mr. Walker making the measurements, a letter was written from the Strathalbyn's counsel to Mr. Jack requesting that a surveyor be obtained with instrument, so that accurate measurements could be made of the Strathalbyn, and telling the measurements desired; whereupon the substance of this letter was conveyed to a man by the name of Cameron, who was an employe of the British Columbia Marine Ry. Cameron, independent of all other surveyors, with his assistant and steel tape, made the measurements

desired. Mr. Lawrence Bogle and Mr. W. H. Hayden accompanied Mr. Walker to Victoria and there met Mr. Jack and Capt. Logan, the latter being employed by underwriters interested in both vessels, and they sojourned to the vessel and started to take measurements. Prior to this trip, evidence had been taken in Tacoma and the signal lamps had been introduced in evidence and were in court in Tacoma. When the measurements were to be taken, it was asserted by the surveyors that the distance between the outer edges of the blocks in the forward end of the port and starboard light screens was the distance between the center of the wicks of the lamps. Counsel for the Strathalbyn did not agree with this statement and asserted that the outside edge of these blocks corresponded with the inside edge of the wicks of the lamps. It so happened that the light boxes were attached to a swinging door in a wooden bulwark or rail around the chart room bridge and that through this swinging door and light box was a hand hole cut just back of the brackets on which the lamps rested, and there was a fair-way across the ship so that the tape could be stretched through the hand holes from the iron brackets in each light box, and counsel for the Strathalbyn suggested that these iron brackets would furnish a definite point from which the measurements could be taken and that the actual and definite distance between the wicks of the lamps

could be ascertained by adding the distance from the outside of the lamps to the edge of the wick to the distance between the iron brackets. This measurement between the iron brackets was, therefore, taken, and the measurement between the blocks abandoned. Cameron knew nothing of this. Cameron constructed or drew a tracing from the measurements that he had obtained, the object being to get the distance between the lights, and placed on the tracing a line extending downward from the outside edge of the blocks in the forward end of the port and starboard light screens, assuming that that was one of the measurements he was to receive from the surveyors. A blue print was taken from the tracing and on this blue print Mr. Jack, from his notes, wrote in the data that was to be incorporated in the blue print, but in the hurry of getting away (he lived in New York,) neglected to notice that the lines above referred to were dropped by Cameron from the outer edge of the blocks. The blocks are each four and one-half inches wide; the bracket was an inch from the inside board of the screen. This made a difference of three and one-half inches in each light box or a difference of some seven inches in the total measurement across the ship. After the blue print was prepared, it came into the hands of Mr. Hayden, who, supposing it was correct and being then extremely busy taking testimony prior to the Strathalbyn's leaving (final

testimony being taken late the night before she sailed,) and being engaged in court with other matters, did not examine this blue print until after the Strathalbyn had left port, and then, when making a copy of the blue print for the use of Virginian's counsel, for the first time noticed that the distance measured between the iron brackets was given as the distance between the outer edges of the blocks. To this he immediately called the attention of Virginian's counsel and asked if the blue print could not be correct, and thereafter counsel for the Strathalbyn was notified that Mr. Walker contended the measurements as shown on the blue prints were correct. This error and the refusal to correct the same compelled the taking of testimony of Capt. Crerar (App. 88) and Mr. Purdy (App. 92) in Liverpool, of Mr. Jack in New York (App. 445), of Mr. Walker in Seattle (App. 1036) and Mr. John Cameron (App. 511) and Mr. Logan in Victoria (App. 490) and Everett (App. 553) and the re-measurement of the ship in Everett, as per survey report in evidence together with the testimony at Everett of Mr. Sandilands (App. 555) and Mr. Gilroy (App. 557), the engineers who had been on the ship constantly from the time she left after the collision until her return to Puget Sound. The sum total of this testimony and the re-measurement at Everett proves that Mr. Walker is in error in insisting that the true distance between the

outer edge of the blocks in the light screens is 46 feet 10 inches, and shows that the true distance between these points is 47 feet $3\frac{3}{4}$ inches (App. 523-527-528-529), and the true distance between the inboard edges of the bulwark eight feet forward of the house was 48 feet $7\frac{1}{2}$ inches (App. 531), making a difference between the distance across the ship between the bulwark rails and across the ship between the lights of 1 foot $3\frac{3}{4}$ inches, or a tumble home on each light screen from the inboard edge of the bulwark rail of 7.87 inches, say 8 inches, on each side of the ship. These errors in recording the measurements on the blue print would probably not have been noticed had not Mr. Hayden at the time made a note of the measurements taken and had he not fixed the distances so clearly and positively in his memory. Under stipulation, Mr. Hayden filed an affidavit as to the measurements taken at Esquimalt, with the privilege of Mr. Bogle, who was also present, to file a counter affidavit. Mr. Boyle made no counter affidavit. If there should still remain any controversy as to the measurements and if the court will believe the testimony of those who saw the lights, the dispute as to the measurements becomes of little or no consequence. There is no question but what the inside of the bulwark rail extended beyond the lights on a line dropped perpendicularly to the extent of say 8 inches. There is no question, either, that the tes-

timony shows that the stanchions were arranged with a tumble-home (Waadne and Leach, *supra*). Mr. Fowler's testimony substantiates this last assertion, when he says that the light would be obscured only about two degrees by the stanchions.

Taking the testimony as a whole, we do not doubt the court will find the stanchions did not obstruct the light. There is this fact about the starboard light which differentiates it from the port light, and does have some tendency to establish that the starboard light might have been more easily obscured, depending upon the position of the observer, than the port light—and that is that the vessel had a list of 6 degrees to starboard and the stanchions on that list would naturally overhang the starboard light to the extent that the height of the stanchion above the light, say 3 feet, would extend outward when listed at 6 degrees, or say $4\frac{1}{2}$ or 5 inches, but this overhang of the starboard light would only tend to more clearly expose the port light when looked at from any point above it. The port light was the only light exhibited or intended to be exhibited to the Virginian. The testimony concerning the starboard light is wholly immaterial for, from the moment the Strathalbyn and Virginian were drawing close together, the starboard light never was, or never was intended to be, thrown up to the Virginian.

The Strathalbyn's lights were sufficient. They were passed by the Board of Inspectors of Lights in Great Britain. The certificate of inspection is in evidence. The lamps are in evidence. An inspection of them discloses that they are large and fine lamps. They were properly trimmed, fresh, clean oil and new wicks being put in them by Taylor, quartermaster of the Strathalbyn. There is some suggestion in the District Court's opinion that the testimony of Taylor concerning the trimming of the lights might have been corroborated by other witnesses on the Strathalbyn. That could easily have been done. We did not think it necessary. Taylor was the man who did the work. It was our view that the testimony of eye-witnesses that the lights were burning properly at the time of the collision was the best proof there was nothing the matter with the lights. We believed the only interest any court would have in the condition of the lights was their condition just before, and at the time of, the collision.

The testimony as to the partial obscuration of the green light is entirely immaterial in this case, even if the Court should consider it true.

Mr. Purdy, the Strathalbyn's first officer, says that when the Strathalbyn was off around Robinson Point, headed for Pully, for a time the Flyer and

Virginian were from a quarter to a half point on her starboard bow (App.310-311). Hofstetter and Beaumont were looking at the lights, when so positioned, and saw the Strathalbyn's side lights. When the Strathalbyn blew to the Virginian, it was Capt. Beecher, the pilot's, intention that the Virginian should not see his green light (App. 211), and, as he says, he, therefore, threw up his red light to the Virginian, and there is no question but what it was visible to her. He ported a point and a half or two points (App. 327), and if the Virginian's only eye-witness, Capt. Fowler, is correct that the red light was obscured two degrees, then the light was plainly visible to the Virginian as soon as the Strathalbyn ported, notwithstanding this small obscuration. To beat this conclusion, the Virginian devises the theory that the Strathalbyn and Virginian came into collision directly head on; in other words, so that the lines of the keels of the Strathalbyn and Virginian, if extended, would be parallel at the moment of collision. They allege, in their libel, the vessels met head on, or nearly so. To adopt this theory requires the Court to totally disregard the evidence as to the angle of approach and collision of the eye-witnesses both aboard the Virginian and the Strathalbyn, and, in addition, to brand as false the evidence that the course of the Strathalbyn was changed, as given by all the navigating officers on the Strathalbyn. Notice the eye-

witnesses' statements. Mr. Miguel, the lookout on the Virginian, says he didn't see anything of the Strathalbyn until he heard the call of the Strathalbyn's lookout to the men in her forecastle to get out of the forecastle. Miguel says that, when the vessels struck each other, it appeared as though they hit at about right angles. He made this statement during the examination of counsel for the Virginian, and he positively reiterated it several times on cross-examination, and described how he could see the side of the Strathalbyn for half her length (App. 871-880-881). The pilot, chief officer and master of the Strathalbyn, who had no difficulty at all in seeing the Virginian, testify that the angle of approach was from $2\frac{1}{2}$ points to what appeared to be more like a right angle off the port bow of the Strathalbyn (App. 248-209-317, Ex. A, Beaumont). Note Exhibit A by the Strathalbyn lookout: *App. 317*



Mr. Callan, who had sold coal to the Strathalbyn and was aboard while it was being tested out, came out of the engine room, which is abaft of amidships, and stood on that deck and saw the Virginian coming into the Strathalbyn from off the Strathalbyn's port side.

Is the eye-witness testimony to be wholly discredited and the case be decided as though it had never been given because Capt. Gibbs, Mr. Fowler and

Mr. Erismann testified that they believed, when looking at the damage to the Strathalbyn, and considering her list of 6 degrees to starboard, and considering the fact that the stems of the Strathalbyn and Virginian crossed in the collision, that it must have been a head-on or nearly so collision? They do not pretend to state at what angle the collision occurred if it was not head-on. Mr. Gardner, of San Francisco, expresses his opinion that the collision occurred directly head-on, basing his conclusion on the above facts.

These experts simply submit their deductions without any detail of reasoning or recitation of facts, with the exception that the Strathalbyn had a list of 6 degrees to starboard and the stems of the two vessels crossed each other, carrying away the upper part of the stem of the Strathalbyn above the 29-foot mark to starboard and bending the stem of the Strathalbyn below the 29-foot mark to port. As experts opposed to the experts introduced by the Virginian, the Strathalbyn took testimony of Mr. Jack in New York, employed by the Strathalbyn's owners to repair her, and the testimony of Mr. Dickie in San Francisco, who had the plans of the Virginian, the plans of the Strathalbyn, and photographs from which to make his study. It appears from the testimony of Mr. Jack and the testimony of Mr. Dickie, that the stem of the Virginian, in passing through the Strathalbyn, bit into the beams

of the Strathalbyn and blazed her way through the Strathalbyn by niching on each beam the point where her stem came in contact with it. The line of the Virginian's stem from the stem of the Strathalbyn to the point of its exit is therefore distinctly marked and so distinctively marked that there is no doubt about the line pursued by the stem. This line shows that the Virginian entered the Strathalbyn at an angle of three points, or, as given by Mr. Dickie, an angle of 33 degrees and 49 minutes (App. 756; Ex. Dickie 329 E). In the latter part of the course of the Virginian's stem there is a curve in the line to the left as the Virginian was passing out of the Strathalbyn. The Strathalbyn's starboard list was increased by the collision and she rolled back before the blow was over, thereby causing a curved line to the left to be shown in the course of the Virginian. The Virginian suggests another way: That the Virginian's stem was deflected to port. The line of the indentation and scars caused by the Virginian's stem do not show this. The angle of cutting is established before the deflection commences, as shown by the curve on Ex. Dickie 329 E.

The period that the two vessels were together was so short that it is almost impossible to conceive that either vessel was materially deflected

from its course, especially during the first part of their contact, which could not have been over a few seconds. The master of the *Virginian* describes the vessels as being together about the length of time it takes to snap your fingers (App. 837-857), and all agree they were together but a very short time. The yielding of the material of both the *Virginian* and the *Strathalbyn* lessened the tendency to deflect, but the natural law of inertia and the tendency of heavy bodies to follow the direction of their movement, makes it impossible to conceive that there could have been any perceptible fending off of one vessel from the other until after the cut had been made in the *Strathalbyn*. The *Virginian* was 492 feet long, 58 feet 3 inches beam and 31 feet 9 inches depth, with a net tonnage of 5,077 and a gross tonnage of 9,904. The *Virginian* was drawing 17 feet forward and 20 feet aft. The *Virginian* had an overhang of about 12 inches and the *Strathalbyn* a small overhang of about 4 inches above the point of collision. The *Strathalbyn* was a vessel 377 feet long, 52-foot beam, drawing 22 ft. 6 in. forward and 25 ft. aft (App. 771), and loaded with over three million feet of timber, weighing substantially three pounds to the foot, with all her coals, stores, water and other matters aboard preparatory to a long voyage. The distance from the stem of the *Strathalbyn* to the after end of the cut is about 30 feet, and the beam of the *Strathalbyn* at the end

of the cut is 38 ft. 10 in., which would require a deflection, if the *Virginian* struck the *Strathalbyn* directly head-on, of one-half that distance, or 19 ft. 5 in., in a distance of 30 ft., and in a period that can be measured only by seconds. To deflect the *Virginian* to that extent in that length of time would require the movement of a wall of water one-half the width of the deflection, viz., 9½ ft. wide, from her stem to her stern, and for a depth of 17 ft. forward to 20 ft. aft, as well as the movement of her dead weight; or if the *Virginian* was not deflected, then the blow would have turned the head of the *Strathalbyn* 19 ft. 5 in. to port with all her weight and the weight of water along her length and for her depth. The *Strathalbyn* would deflect to port, for the lower part of the stem of the *Strathalbyn* was on the starboard side of the *Virginian*, which was wedging it over to port except as the upper part of the *Virginian* was driving the *Strathalbyn*'s stem to starboard as it was cutting through, and clinging to, her beams and plating in that direction. If both vessels deflected, a corresponding weight would have to be moved sideways by the blow. The *Strathalbyn* was swinging to starboard when the blow came, and, as a matter of fact, the blow was not sufficient to stop that swing; but the length of time that the *Virginian* was cutting through the *Strathalbyn* was so short that the *Strathalbyn*'s swing to starboard had no perceptible effect on the

direction of the cut (see testimony Jack and Dickie.) When testimony is inherently improbable, it is impossible to understand how credence can be given it in the face of direct and uncontradicted testimony of eye-witnesses, to a contrary fact. We submit, however, without resorting to the testimony of eye-witnesses, that the study made of the subject by Mr. Dickie with the information before him, and the study made of the subject by Mr. Jack with his intimate knowledge and daily contact with the repairs, being much more thorough, is entitled to greater weight, especially as their conclusion is easily verified by a study of the data introduced in evidence. It is the only expert testimony in the case which deals with the evidence left by the cuts of the Virginian's stem on her course through the Strathalbyn. This evidence proves conclusively that the angle of contact of the Strathalbyn and Virginian was far greater than that attributed to it after the cursory examination of the two vessels given by the other experts in the case. We insert a photo of part of Ex. 5-5, the dark line on which indicates the course of the Virginian through the Strathalbyn. It enters at the stem at the point marked EN and leaves at the point marked L. (See testimony of Jack in explanation, App. 414). The photographs of the Strathalbyn's damaged bow show the angle of the cut very plainly.

It being determined that the angle of contact was substantially three points off the Strathalbyn's bow, and it being uncontroverted that the Strathalbyn ported her helm on her first whistle to the Virginian (for the officers on the Strathalbyn know what they did in that regard, and so testify), then there is no excuse for the Virginian failing to see the port light of the Strathalbyn. The lower court seemed to think there was too much attention being paid by the officers on the Strathalbyn to her lights just

prior to the collision. The lower court, however, does not question that the witnesses on the *Flyer*, the passengers, saw the *Strathalbyn's* port light prior to and at the time the *Strathalbyn* was passing the *Flyer*. The lower court does not question that the *Virginian's* navigating officers and lookout saw it immediately after the collision. The port light as a burning light is established, then, when the *Strathalbyn* and *Flyer* were approaching and opposite each other and, therefore, prior to and at the time the *Strathalbyn* whistled to the *Virginian*. If her port light was then thrown up to the *Virginian*, it makes no difference whether it was out or dim before the time the *Flyer* passed the *Strathalbyn*, if the court should so conclude, or whether much or little attention was paid to it at or prior to such time, for it was displayed during the time that the *Strathalbyn* was whistling to the *Virginian*. The *Strathalbyn's* course was northwest half north magnetic and the *Virginian's* course is alleged to be southeast quarter south between Robinson and Pully. The *Virginian* and the *Strathalbyn*, under these circumstances, were sailing along courses only diverging a quarter of a point, or between two and three-quarters and three degrees. If the *Strathalbyn's* lights were obstructed to the extent of two degrees, as testified to by Capt. Fowler, it would only require the *Strathal-*

byn's course to be changed one degree to northward to exhibit her red light unobstructed, for the Virginian was a little off the Strathalbyn's port bow when within whistling distance. But the Strathalbyn, on her first whistle to the Virginian, ported over a point and thereafter swung over more than another point to starboard, which brought her head well to the eastward of Pully Point, as testified to by Capt. Beecher. Commence at a point, say, half-way between Pully and Robinson Points and set a course of north by west half west or north by west. This corresponds with Capt. Beecher's range taken while the Strathalby was swinging. Now, as the Strathalbyn alleges that the Virginian was traveling fast as she was approaching the Strathalbyn, while the Strathalbyn had barely steerage way, the change of a point in the course of the Virginian to port would cut out her red light and expose the green and would bring the vessels together on an angle of substantially three points, which is the angle that they met upon. Under these circumstances, there can be no question that the Strathalbyn's red light was plainly visible to the Virginian long before the collision occurred and when the vessels were in the neighborhood of from a half to three-quarters of a mile apart. This being so, it is not necessary to find any reason why the Virginian should navigate as she did. Her lookout testifies he did not see the lights. The fault, then, is

an insufficient lookout. The pilot may have taken the Strathalbyn's red light for the red light on Pully Point, or, if he saw the Pully Point red light, as he testified he did, and saw the Strathalbyn's red light, then he may just have assumed that it was a small tug coming along with a tow, and paid no attention to it until too late. The Strathalbyn, being loaded deep and her side light being set low, might give that impression. But whatever the explanation, it, of course, lies solely in the mouth of the officers of the *Virginian* and is undiscoverable from the testimony. It is impossible to believe that not one person on the *Virginian* saw the masthead or side lights early enough to avoid the collision, particularly when the Strathalbyn was constantly whistling. But in the testimony there are hints that the lookout was not attentive to his duties, or if he was, that he has not correctly testified. The lookout on the *Virginian* testifies positively he does not remember seeing the *Indianapolis* (App. 874), yet the *Indianapolis* passed the *Virginian* between the time that the *Virginian* rounded Pully Point and met the Strathalbyn. He is asked: "Up to that time, did you see any light from any ship from which this whistle could proceed?" and answered: "I could see—I saw a red light and reported it." He then says it was Robinson Point light, which later brings out this question from Mr. Hughes: "But I am ask-

ing you whether you saw any ship's light at the time or after hearing either of these two whistles? A. No, sir—I didn't see any *other* ship's light." (App. 869-870). No explanation is made in his testimony as to what other ship he refers to, and there could have been none other except the Strath-albyn, since he does not remember seeing the Indianapolis. Pilot Duffy speaks of being on and off the bridge (App. 1180). Duffy is quite uncertain in several particulars of importance.

(App. 1160): "What did you do when you heard this second whistle? The whistle I am talking about now is the first whistle to you?"

A. I could not see anything. I ordered full speed astern.

Q. How was your vessel going when you ordered full speed astern?

A. Full speed ahead.

Q. Did you stop her at any time between full speed astern and full speed ahead? A. No.

Q. Gave no signal to stop her? A. Oh, yes; I stopped her.

Q. When did you stop her? A. When I heard that whistle.

Q. Which whistle? A. The second whistle, that I supposed was for me.

Q. You say the second whistle? A. I mean when he whistled for the Flyer.

Q. That is the first whistle? That is, the first whistle to you?

A. I supposed it was for me."

(App. 1177): "Q. When did you ring to stop or back her the first time? A. The first whistle *after* she whistled to the Flyer.

Q. Then you stopped her? A. Stopped her."

He was asked which whistle caused him to stop.

A. "The first whistle was to the Flyer and the second to me.

Q. Then you stopped? A. Yes, sir."

(App. 1178): He testifies he rang full speed astern when heard third whistle from Strathalbyn, which he thought was the second to him, and that he judges the interval between them was less than a minute. If we read this testimony correctly, he first testifies he stopped when the Strathalbyn first blew to the Flyer and he could not see her, and later testifies he stopped when the Strathalbyn blew her second whistle, which was the first for the Virginian.

(App. 1183): Duffy refers to the time Capt. Green came on the bridge.

Q. (Capt. Green) "Came up after you stopped?

A. When the telegraph was rung to stop, Capt. Green ran up on the bridge.

Q. How long had he been on the bridge before the collision?

A. Well, it would be, I should think, half a minute, between half a minute and a minute.

Q. You think that is about right, do you? A. Yes, sir.

Q. You think he came up about a half a minute or a minute before the collision? A. Yes; he came up just when the telegraph stopped."

Duffy is questioned about the time his vessel is reversed.

(App. 1162): "Q. After giving the signal full speed astern, did you hear any other whistles from ahead?

A. I heard a danger signal.

Q. When did you hear the danger signal with reference to the time you reversed both of your engines? A. It must be a minute or over.

Q. Did you answer this danger signal? A. The Captain answered that, or ordered it answered.

Q. State what happened after you heard the danger signal and answered it with three blasts?

A. The ships came together. Well, I guess it did not seem half a minute. It was not very long."

From the above (App. 1183), it is plain Duffy fixes the time of Green's coming on the bridge by the *stop* signal (and this corresponds with Green's testimony), and says Green was on the bridge less than a minute before the collision. Then the stop signal must have been given less than a minute be-

fore the collision. Yet he also fixes the time of the collision (at p. 1162), saying he stopped about a minute before reversing (the interval between the Strathalbyn's whistles), reversed a minute or over before the danger signal and continued ahead half a minute after the danger signals, making two minutes and a half or over that Green was on the bridge before the collision.

He is interrogated about the position of the *Flyer* in relation to its position to the *Virginian* approaching and passing Pully Point.

(App. 1184): "Q. And did you change your course when you got to Pully?

A. We changed our course just before we got to Pully. The Point looked close and I pulled her out a little.

Q. The Point looked close? A. Yes. *The Flyer was a little to the front.*

Q. Then you pulled her out to the westward?
A. Yes sir."

(App. 1185): Later he was asked:

"Q. Now where was the *Flyer* when you changed your course between Alki to Pully towards the west?

A. She was, oh, a couple or three—well, just astern of us a little to the port side."

(App. 1189). Questions are propounded to him with a view to ascertaining if the *Virginian* was

ahead of the Strathalbyn sufficient to see the Strathalbyn's side and masthead lights after the collision.

(App. 1189): "Q. How much aft of her" (Strathalbyn's) "beam would you be, following the Strathalbyn from the point of the collision over to Robinson's Point?"

A. I do not know because sometime we would be *forward of the beam* and sometimes aft of of the beam."

(App. 1190): "Q. Now when you drew up beyond her beam as the Strathalbyn was going from Pully Point to Robinson's Point, did you see the side light at any time then?"

A. I do not know as I ever was forward or aft of her beam.

Q. I thought you said forward.

A. I said I did not know whether I was forward or aft of the beam at any time."

These instances of inharmonious testimony from the one man who should know casts suspicion on the accuracy of any part of his testimony, particularly that concerning the nature and character of the Strathalbyn's lights, and the time before the collision that his engines were stopped and reversed.

While referring to the Virginian's fault in failing to see the Strathalbyn's lights, we will refer to the following cases in the Supreme Court of the United States and the federal courts, which

deal with collisions brought about through non-observance of lights:

(1) *The Propeller Genesee Chief vs. Fitzhugh, et al.*, 12 How. 443; 13 Law. Ed. 1058. The steamer saw a schooner's light; lost sight of it again; could have seen it within a half a mile. "He knew that the vessel was ahead and so near, nothing could excuse the rashness of continuing the steamboat at full speed if he supposed the schooner was meeting him and not running on the same course." The *Genesee Chief* was held at fault for having an improper lookout.

(2) *The New York & Baltimore Trans. Co. vs. The Philadelphia & Savannah Steam Nav. Co.*, 22 How. 461; 16 Law. Ed. 397. The propeller's lights were seen for some three miles and continued in sight; propeller neared the steamer, and suddenly shifted her course; the steamer was visible but not seen. "Beyond question, the law is well settled that steamers approaching each other from opposite directions are *respectively* bound to port their helms and pass each other on the larboard side. That movement of the propeller" (starboarding her helm) "was a direct violation of the rules of navigation and was entirely without any excuse."

(3) *The Union Steamship Co. of Philadelphia*

vs. The New York & Virginia Steamship Co., 24 How. 307; 16 Law. Ed. 699. He knew that another steamer was approaching, although he denies that he had seen her lights." * * * "But the great fault committed on the occasion was that of putting the helm to starboard instead of keeping the course or *porting* it when it became known that the other steamer was approaching."

(4) *Tourette & Butler vs. Burton*, 1 Wall. 43; 17 Law. Ed. 609. "Witnesses for the respondents or some of them testify that they did not see the light until just before the collision occurred, and the inference is attempted to be drawn from that fact that the light was in an improper place, but the weight of the evidence satisfies the court that it could easily have been seen if there had been proper vigilance on the part of those in charge of respondent's vessel."

(5) *The Wm. T. Frazier vs. The Wenona*, 19 Wall. 41; 22 Law. Ed. 52. "Both vessels also showed signal lights, but it is insisted by the respondent that the signal lights of the schooner were not properly located upon the vessel. It clearly appears that the lights were burning brightly, and that they were seen by the propeller in ample season to have enabled her to have adopted any proper precaution to have avoided a collision."

(6) *Fink vs. The Steamboat Fairbanks*, 9 Wall. 402; 19 Law. Ed. 708. "Some conflict exists in the testimony as to the point whether the brig had the required lights and whether she kept her course as alleged in the libel. It is satisfactorily proved that the brig had the required lights and that her outlooks were properly stationed on the forward part of the vessel."

(7) *The Schooner Sarah Watson vs. The Steamer Seagull*, 23 Wall. 165; 23 Law. Ed. 90. "Both vessels had proper signal lights and both had lookouts, but the better opinion is that the lookout on the steamer was not as vigilant as he should have been in the performance of his duty. Strong support to this view is derived from the fact that the lights of the steamer were seen by the lookout of the schooner when the vessels were three or four miles apart, but those in charge of the steamer saw nothing of the schooner until the two vessels were within a half a mile of each other, and then saw at first only the sails of the schooner and those indistinctly."

(8) *The Bluejacket vs. The Tacoma Mill Co.*, 144 U. S. 371; 36 Law. Ed. 469. Both vessels allege but did not prove defective lights. The sailing ship was held at fault because, after the tug began to port, the sailing ship changed her course to starboard.

(9) *The Oregon*, 158 U. S. 186; 39 Law. Ed. 943. The vessel was at anchor in the Columbia River, and displayed her anchor lights.

"The weather was calm and the sky somewhat cloudy, but the night was such a night as is most favorable to the discovery of lights." "The light which the pilot saw both above, at and below Bogle's Point and which he mistook for the Coffin Rock light was, in fact, the light of the Clan McKenzie, and the Clan McKenzie was not discovered until the Oregon was within 300 feet of her," the court remarking: "In short, there can be no doubt whatever that this collision was attributable to the inefficiency of the pilot and lookout of the Oregon."

(10) *The New York*, 175 U. S. 187; 44 Law. Ed. 126. Here it was charged that the lights were not visible, but the testimony did not sustain the charge in the court's conclusion. The court, however, says:

"If the New York heard the signals" (of the Conemaugh), "it was her duty to answer them. However, the white light in connection with the whistles could only have been the masthead light of a steam vessel, and, as there is no evidence that there was any other vessel coming up the river, the signal could only have been intended for the New York.

(11) *The Golden Dove*, 13 Fed. Rep. 674. It was charged that the brig did not have proper lights, but the steamer was held wholly at fault because she did not have a sufficient lookout and because her officers were careless.

(12) *Farwell vs. The Steam Boat John H. Starin*, 2 Fed. Rep. 100. The steamer was held at fault because her lookout was negligent and did not see the schooner's red light until it was too late to avoid the collision.

(13) *The Pegasus*, 19 Fed. 46. Here the Pegasus failed to see the lights on the tug, and it was held that her lookout was in fault. The opinion says:

“Precisely where this negligence should be located is not important; it suffices that they failed to see them when they were plainly visible to those in charge of the steamer, if they had used due diligence.”

(14) *The Avon*, 22 Fed. 905, was a case where the vessel displayed two anchor lights. The Avon's crew did not make out the light in time to avoid the collision. The Avon was held solely at fault.

(15) *The Thingvalla*, 48 Fed. 764, where it was claimed that the Thingvalla's lights did not show, but this claim was not sustained.

(16) *The Alice B. Phillips*, 81 Fed. 415, where the court says:

“The distinction urged upon our attention in appellant’s brief between an inquiry as to whether the schooner’s *port light* was burning at all and an inquiry as to whether it was so burning as to be properly visible, is one which does not appear to be material under the evidence. The testimony of those on board the schooner is harmonious, positive and creditable, and is distinctly to the effect not only that the light in question was actually burning, but also that it was bright; and we cannot agree that because it has been testified that some—perhaps all—of these witnesses *especially looked* at the light to observe its condition when the steamer was perceived to be approaching we should regard their statements with suspicion. On the contrary, we think this was a perfectly natural thing for them to do under the circumstances, and that the fact that they did do it makes their testimony all the more certain and reliable.”

(17) *The Robert Graham Dunn*, 107 Fed. 994, exhibits another instance of the assertion that the schooner’s lights were defective, but the court found:

“That she carried proper lights and that they were not obscured from the observation of the

steamship and that the collision was wholly attributable to the conduct of the steamship."

(18) *The John H. Starin*, 113 Fed. 419. Here the *Starin* struck the schooner *Allen Gerney*. It was claimed that the schooner had a lantern in her fore-rigging, she being at anchor, but that it was not burning at the time of the collision. The *Starin's* witnesses swear no lights were visible, and the schooner's witnesses swear the light was burning and visible prior to and at the time of the collision. *Outsiders testify* that they saw the light, but it is not clear whether they saw the light within thirty minutes of the collision. The steamer was held.

(19) *The Richmond*, 114 Fed. 208, has the following in the opinion: "The only fault alleged against the schooner seriously contended for is, that at the time of the collision, its lights were not up and set and properly burning." After referring to the testimony of the officers on the schooner that twice within forty minutes before the vessels came together, he saw the lights in place and properly burning, and after considering the testimony of the man who trimmed the lights, the court remarks: "The positive testimony of those on the schooner in a position to see the lights, and know their condition, will not be lightly rejected because other persons, whose duty it was to have

seen them, either failed to observe, or happened not to see them. Negative evidence of this character cannot be accepted to out-weigh positive evidence. The failure to observe a light cannot be said to disprove its existence." * * * "The court should be slow to hold that the officers and crew of the vessel were navigating the same without lights, as, by so doing, they were imperiling not only the ship and the cargo, but their own lives." * * * "Had this lookout been competent or in the proper discharge of his duty, the schooner could easily have been seen and reported with or without lights, according to his own statement, in time to have avoided the collision." None of the witnesses except the lookout on the *Virginian* made out the *Strathalbyn's* loom, and the lookout only saw her loom 10 seconds before the collision.

(20) *Helen G. Moseley*, 117 Fed. 760. The red light of the schooner was not seen until within less than a minute of the collision, according to the testimony of the men on the bridge, and the lookout on the steamer. They testify that when it did appear, it was small and dim and about a ship's length off. The opinion reads:

"Hence, four suitable men in the positions stated claim to have been looking forward and around for lights, yet each testifies that he did not see this light until the moment named. But the light existed, it

was uncovered and was sufficiently bright to have been seen for ten minutes before the collision." * * * "Therefore, the question is, whether a supposition that there is not sufficient support from the evidence should be adopted because it would relieve persons who should have seen a light from their failure thereof. It is not the province of the court to find theories but facts. There is no doubt that the steamer was employing a suitable lookout, and that the men on watch were using a fair degree of care, but had they exercised requisite care, no reason for their failure to discover the existing red light on the schooner is shown."

(21) *The Helen G. Moseley*, 128 Fed. 402. The steamer charges that the schooner's red light was a small, dim red light, and that they saw the loom of the sails on the starboard bow as soon as the lights. All of the men on the steamer were experienced. The court says in its opinion on appeal:

"It is difficult to understand how such a crew of officers and men, in the beginning of their watch, could have failed to see the red light earlier if it had been visible." * * * "Nevertheless, individual aberrations of sight and attention do occur, even among the ordinarily careful, and, however enormous the odds may be against such a simultaneous occurrence among four persons, the combination is possible. Therefore, under well-settled prin-

ciples, unless there can be shown some cause, due to the schooner, why her red light was not shown to the steamer until in the very jaws of the collision, the conclusion must be that the steamer was in fault."

(22) *The Queen Elizabeth*, 122 Fed. 406, from which it appears, by the court's opinion:

"We have no doubt as to the negligence of the *Birdsall*: If her crew had been competent, alert and watchful they certainly would have seen the ship's red light before it was 'right abreast' on the starboard beam." * * * "The evidence that the ship's lights were burning brightly is overwhelming, and if the lookout had been attentive, he could have seen the red light twenty minutes prior to the collision and when the ship was miles distant. His failure to do this on a clear night was unquestionably a fault."

(23) *The Three Brothers; The Stamford*, 136 Fed. 479. "The Three Brothers insist that the lights of the *Stamford* were being put up at the time of, or just before, the collision, but it satisfactorily appears that they were duly set and were brightly burning up to, and subsequent to, the collision."

(24) *Brigham vs. The Luckenback*, 140 Fed. 322, where it appears that "The respondents

accuse the schooner of fault in that she did not have proper side lights set and properly burning at the time of the tug's approach. Upon this point there is the distinct, affirmative evidence of those upon the deck of the schooner that the lights were lighted and burning at the time of the collision." One witness says: "He looked at the lights three times as the steamer was approaching. The lights were burning brightly;" and the question was asked, "Are the lights burning?" and answered, "Yes, sir." Several cases are quoted from in the opinion. The court concludes: "The failure on the part of the tug to see those lights was due to the want of a vigilant and efficient lookout."

(25) *The Martha E. Wallace*, 148 Fed. 94. The vessels were approaching each other so that the Wallace was showing her port side to the Richie. The Wallace was sought to be held liable, without success, because her port light was not properly burning. The court: "It seems to be a case justly falling within the decision stated by Dr. Lushington in the 'Vivid.' 'The parties may swear that they did not see a light, but that never can be received in evidence in opposition to those who say that they showed a light, because both statements may be true. A light may have been exhibited and those on board the steamer may not have seen it'."

(26) *The John Bossert*, 148 Fed. 903. The Witley recovered. "That the light on the Witley was seen from the Bossert just before the collision is admitted."

(27) *Bennett vs. The United States*, 162 Fed. 64. "The government accuses the brig at fault in failing to have lights properly set and burning at the time of the collision. The government's contention that there were no lights is based upon the testimony that when Admiral Casey came on board the brig, he saw no lights, and that when Bennett rode around the brig, he saw no lights, and that, after the collision, lanterns were found aboard with the lights out. Against this, we have the distinct, affirmative testimony that the lights were properly lighted and set at twelve o'clock, *and there is a presumption that such condition existed at the time of the collision*, there being no testimony to the contrary." "The court must come to the conclusion that the testimony to which I have referred as to the lights being out is not persuasive as against the affirmative testimony that there were lights."

(28) *The Dorchester; the Fannie S. Groverman*, 167 Fed. 124. "There are only two matters found by the District Judge which are controverted on this appeal. The first is, whether or not the red light which it is proved the sail vessel had in her

port rigging was bright enough to be seen at a sufficient distance to give notice to the steamship in time to avoid her, and the other is, as to what distance the sail vessel or her red light was actually seen by those navigating the steamship. On both these matters of fact, the learned Judge found for the schooner. Although there was a conflict of testimony, there was ample proof to sustain the libellant's contention that the schooner's red light was visible if the lookout of the steamship had performed his duty at a distance sufficient to have enabled the steamship to have avoided the schooner if she had ported instead of starboarding."

(29) *The Nanuet*, 176 Fed. 123. "There was no dispute about the schooner showing her *green* light, but it was strongly urged that her *red* light was not burning. *It does not seem that this would have made any difference, as the green light was always in view of the tug*, but if the red light had any bearing whatever upon the collision, there could be no reasonable doubt that it was properly displayed. The testimony on the schooner makes it clear that it, as well as the green, was duly lighted and shown. *This was, as to its being displayed, confirmed by an outside witness from the passing tug*, who saw the light. The lookout on the part of the tug was deficient." * * * "The tug's account of the lights and navigation is incredible.

Those on her apparently did not see the schooner when they should."

(30) *The Colorado; Steam Lighter* No. 24, 173 Fed. 649. It is charged that the lights on the lighter were obstructed by the deck load.

"I think it is probable that the lights were visible to careful observers over the deck load, and the important question in the case is whether the navigation of the vessels was in conformity with the rules and ordinary prudence."

(31) *The Sequin*, 173 Fed. 723. The barge was charged with not having lights. It was found she displayed all the lights required by the statute.

(32) *The Europe*, 175 Fed. 596. "But special complaint is made that she" (the *Europe*) "was anchored without proper riding lights." Judge Wolverton makes a close diagnosis of the evidence and holds the light was sufficient, notwithstanding the testimony that it might have been obstructed. It appears that the light was mistaken for a light on shore.

(33) *The Manhattan*, 181 Fed. 229. "I feel compelled to find that the Albany's lights were burning at and before the collision and should have been seen by competent, attentive observers."

(34) *The Henry O. Barrett*, 161 Fed. 481-482.

“The dredge displayed another light forward, but the District Court found, and we concur in that view, that such light misled no one and did not contribute to the collision.” * * * “These witnesses are interested, swearing to exculpate themselves. I have yet to meet with an instance of collision where witnesses from the vessel in fault did not testify to the faithful discharge of their duties and the faithlessness of the other vessel.”

(35) *The John Englis*, 176 Fed. 723, where the lights were not seen until within 200 feet apart, but they might have been seen a mile away.

(36) *Oceanic Steamship Co. vs. Simpson Lbr. Co.*, 186 Fed. 764. The lights were seen burning 12 minutes before the collision. Held that they were properly placed and burning.

(37) *The Dekatur H. Miller*, 62 Fed. 92. The witnesses for the Miller testified they saw no lights on the Hitch. “All the witnesses on the Miller—the mate, quartermaster and lookout—swear that, just previous to the collision, these lights on the Hitch were not in fact burning and that they never saw any red or green lights on her at all. This may be so. It is possible that the lights, or at least the green light, may have gone out after the mate had examined it. If he had seen to it that the lights were bright, burning and in order when put up at

six o'clock and were in order likewise at half past six and were in like good order at seven, within five minutes of the collision, surely it would be holding them to too strict an accountability if we say they were in fault for not knowing that they were burning within those few minutes.

In addition to the above, failure of lookouts to see lights have condemned their vessels in the following cases:

River & Harbor Improvement Co. vs. Philadelphia Ry. Co., 180 Fed. 954.

The Chas. C. Lester, 174 Fed. 289.

The Hortensino, 174 Fed. 272.

The Larringa, 172 Fed. 264.

The Aries, 165 Fed. 514.

The Dorchester, 163 Fed. 779.

The H. B. Rawson, 152 Fed. 1001. In this case it is held that the tug should be exonerated, although she might have stopped sooner, on the ground that the fault of the steamer was sufficient to account for the collision, and her contributory fault was not clear. There being but one light on each scow, held unimportant in view of the steamer's fault and the fact that the tug carried proper towing lights.

Capt. Penfield testifies that the Strathalbyn's stern light was out when the Indianapolis overtook the Strathalbyn at Robinson Point. Taylor, the Strathalbyn's quartermaster, testifies he left the top of the stern light up in order to give the lamp more ventilation, and that it blew out on a whirl of wind around the Point, but that he lit the same before the collision. Capt. Beecher, on his way back to Tacoma after the collision, called attention to the fact that the green light was growing dim and had the third mate take it in to be touched up. Much has been said concerning these facts, over the Strathalbyn's objection, on the ground that they are immaterial, for the reason that a stern light is not supposed to be seen when vessels are approaching each other and for the reason that the green light was burning brightly at the time of the collision, and it makes no difference how it was burning after the collision. Capt. Penfield testified that the green light was somewhat obstructed, and this testimony was objected to, as was all the testimony concerning the green light, on the ground it was immaterial, for the reason that, during the time the vessels were approaching each other, after it became necessary to navigate them with respect to one another, the green light was never intended to be, and could not be seen by the Virginian on account of the heading of the Strathalbyn. Admitting, for the sake of argument, that the green light was ob-

scured, it did not and could not have misled the Virginian. It would be a violation of the rules to obscure the green light, but such violation would be of no consequence unless it was a factor in bringing about the collision.

The Steamship City of Washington vs. Peter R. Baillie, 2 Otto 31; 23 Law Ed. 600-603. The failure to have a masthead light was considered not to have contributed to the collision.

We have incidentally called attention to differences in the testimony of Eoff, Rich and Cawley, the launch-boys, and Leach and Macquarrie as to the visibility of the Strathalbyn's red and green lights simultaneously beyond Dash Point, on her return to Tacoma. Capt. Burns, of the Flyer, states that he did not believe the red and green lights of the Strathalbyn could be seen from the Flyer as these vessels were approaching. He bases this statement on the fact that he did not see what he terms the range and masthead light of the Strathalbyn in line, and he judged, from the position of the lights he terms the range and masthead light, the Strathalbyn was heading to the eastward of his course. Capt. Milnor and Capt. Burns both testify they saw a masthead and range light on the Strathalbyn. The range light never was set out. They saw some other light which they mistook for it. Burns' testimony that the Strath-

albyn was heading so both her side lights could not be seen from the Flyer is a conclusion drawn from an incorrect premise. It, therefore, must give way to positive testimony of credible witnesses. There are other differences in the Strathalbyn's witnesses' testimony. Do not these differences stamp the testimony of each witness with honesty? The testimony is their testimony, unwarped, undirected and uninfluenced by the testimony of any other witness or by a desire to harmonize such testimony or by a desire to give testimony in accordance with any preconceived plan of attack or defense of the owners of the Strathalbyn or any of their representatives. A great many of the Strathalbyn's witnesses were asked if they had not talked with Strathalbyn's counsel. The divergencies in their stories show that their talks with Strathalbyn's counsel did not have the effect of eliminating inconsistencies in the testimony by moving the witness to tell a story other than he conceived it. This court knows enough of human nature, of the individual differences in the powers of observation and recollection and the different characteristics of expression among witnesses, to willingly accept the rule of logic and experience that seldom two men recount an occurrence exactly alike and to believe in the honesty of the witnesses and their testimony more readily and willingly when their stories vary than if their stories had

no differences concerning the incidental facts of time, location of making observations or matters of that nature.

Considering, now, the second branch of our inquiry, and that is: Was the Strathalbyn's navigation negligent when the Strathalbyn and Virginian were approaching?

The New York and Liverpool United States Mail Steamship Co. vs. Otis P. Rumball, 21 How. 372, 16 Law. Ed. 144. On page 148, the Supreme Court lays down a rule for weighing evidence with respect to the weight to be given testimony of the officers and crew on each vessel. This quotation appears on page 148, at the top of the first column:

"One remark is applicable to all the witnesses introduced by the respondents" (the steamship) "and that is, they had not the same means of knowing respecting the matter in dispute as the witnesses for the libellants possessed, who had charge of the brig and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libellant" (the brig) "speak with actual knowledge, and unless they have wilfully stated what they know to be false, their statements must be correct. They were on the deck of the

vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration." This collision was not caused by inevitable circumstances. It was brought about through the carelessness of either one or both of the steamers. To determine negligence requires an investigation of the conduct of parties before the vessels get close enough together to require perfect judgment *in extremis*. The Flyer's speed was 14 1-2 knots; the Virginian's was 11 knots. In a minute, the Flyer was making 1470 feet; in a minute, the Virginian was making 1115 feet; or, in a minute, the Flyer was going 355 feet farther than the Virginian at the regular maintained speed, before there was any slowing or diminution of speed in consequence of the Virginian and Strathalbyn stopping and reversing when drawing closer together. It would take the Flyer 8 minutes to run a little less than half the distance between Pully and Robinson Points. When the Flyer was half way between Robinson and Pully Points, the Virginian would be 3,000 feet behind if they both left Pully at the same time. The Strathalbyn first blew to the Virginian when she was from a quarter to a half mile (App. 205) away from the Flyer, or, say, 1,000 to 2,000 feet forward of her, so that the distance between the Virginian

and Strathalbyn, when the first whistle was blown, was approximately, according to these figures, 4,000 or 5,000 feet, or two-thirds of a mile or more, provided the Flyer pulled ahead of the Virginian at Pully Point. It appears, however, from the testimony of Capt. Duffy, that the Flyer was hauling up alongside of the Virginian before the Virginian got to Pully Point, and there is some confusion in Pilot Duffy's testimony as to just where the Virginian was passed by the Flyer, but the testimony seems to preponderate that it was off Pully Point. The Strathalbyn was traveling about 6 knots an hour, or 10 minutes a mile. She would be making 608 feet a minute. The combined speed of the Virginian and Strathalbyn is 1723 feet a minute. The Strathalbyn was some 1,200 feet ahead of the Flyer when she blew her first to the Virginian (App. 121). If the vessels were, say, 4,000 feet apart when the Strathalbyn first blew to the Virginian and they maintained their full speed from the time of the Strathalbyn's first whistle up to the collision, they would have met after navigating about two and a third minutes. This time does not check with the time shown by the Strathalbyn's engine room log to have elapsed between the bell to stop the Strathalbyn and the time of the collision. The Strathalbyn's engines were stopped at 7:34 and the collision occurred at 7:38. The time which elapsed was four minutes. The

Strathalbyn's engines were stopped when she blew the second time to the *Virginian* (App. 206, 225). Between the first blast and the second, there was sufficient time elapsed to permit the *Virginian* answering, estimated at about a minute, so that, according to the record of time, there was five minutes elapsed between the first whistle of the *Strathalbyn* to the *Virginian* and the collision, instead of two and a third minutes. This lengthening of time is probably due to the combination of two facts: First, that the *Flyer* passed the *Virginian* probably north of Pully Point, and passed the *Strathalbyn* somewhat nearer Robinson Point than midway between Robinson and Pully Points. The estimate of the distance by the officers on the *Strathalbyn* at the time the first whistle was blown to the *Virginian* is in the neighborhood of a mile (App. 222). The second reason is because the *Strathalbyn* ceased moving as rapidly through the water as 608 feet per minute, and also because the *Virginian* checked her speed during the last minute, by reversing full speed astern. Taking all this into consideration, it is probably safe enough to say that the vessels were a mile apart when the *Strathalbyn* first blew to the *Virginian*. If the vessels were a mile apart and there was no diminution of speed, the combined speed of the two vessels would bring them together in substantially 3 1-2 minutes. The *Virginian's* engine room log

shows that the vessels came into collision at 7:58 and that the engines were stopped at 7:57 and sent full speed astern at 7:58. There was, therefore, a minute during which the *Virginian* was moving without the propulsion power of her propeller, and her speed necessarily would be checking, to some extent, although not very much, according to Pilot Duffy. He says the *Virginian* went three-quarters of a mile after stopping up to the time she went full astern (App. 1178). The *Virginian* was reversing a few seconds before the steamers came into collision, as Capt. Beecher saw the engine turn over and throw water up under her quarter after the three whistles had been blown from the *Virginian* and she was about striking the *Strathalbyn*. The engine room log, where time was actually kept, shows that at least 4 minutes elapsed while these vessels were approaching each other, and the engine room log, taken in connection with the testimony of Capt. Beecher, shows that at least 5 minutes elapsed while the steamers were coming together. It is safe to say that the estimate of three-quarters of a mile to a mile as the distance the vessels were apart when the *Strathalbyn* first commenced to signal to the *Virginian* is not too great. The *Strathalbyn* and *Virginian* were on substantially opposite courses. The *Virginian* was heading southeast a half south magnetic (App. 1157), and the *Strathalbyn* was heading northwest

a half north magnetic (App. 229). The vessels were in the usual track of vessels between Tacoma and Seattle. Whatever variation there was in the position of the vessels was due to the difference in their point of departure, and the point of departure of both the Strathalbyn and Virginian is an estimate. The Strathalbyn estimates she was off Robinson Point a quarter of a mile, and the Virginian estimates she was off Pully Point a half a mile. There was nothing special to fix these distances in the minds of the pilots at the time. The Strathalbyn saw the red and green lights and mast-head and range lights of the Virginian substantially over her stem, but a little on port bow. When taking these courses, or afterwards, the Strathalbyn swung sufficient to place the Virginian a little over her starboard bow at one time, and, as the Flyer was taking substantially the same course, the red and green lights of the Strathalbyn were visible on the Flyer, as she was approaching the Strathalbyn. The estimates of distances that the Strathalbyn and Virginian were apart, of course, are only made by those on the Strathalbyn, because the Virginian claims that it could not see the Strathalbyn. The Strathalbyn's liability must be determined, then, by her own testimony. On the second whistle, according to Capt. Beecher, the Strathalbyn's pilot, the vessels were about half a mile apart. On the third, they were from

1,200 to 1,500 feet apart (App. 227); and, on the danger, they were from 600 to 800 feet apart (App. 228). On the second whistle, when the *Virginian* was thought to be half a mile off, the *Strathalbyn* was stopped. If the *Virginian* was making 1,100 feet a minute, it would take about three minutes to make this half mile. It was, however, three minutes between the time the *Strathalbyn* was stopped until she reversed, and a minute after she reversed until the collision, so that four minutes elapsed between the signal to stop, which was on the *Strathalbyn*'s second whistle to the *Virginian* and the collision. From the above, it appears that this estimate of a half a mile cannot be an underestimate of the actual distance. The vessels approached until they were within about 1,500 feet of each other, when the third whistle was blown, at which time the red light of the *Virginian* had disappeared. It did not show up again. When the vessels were within about 800 feet from each other, the *Strathalbyn* blew the danger signals, reversed her engines (App. 228), and the vessels came together in a minute thereafter. It is likely that the distance is about correctly stated, for the *Strathalbyn* was nearly at a standstill during the greater part of the four minutes from the time of her stopping until the collision, and was making a course off to starboard instead of directly ahead. Capt. Beecher and Capt. Sprague both agree that

after Capt. Beecher had given the one blast and directed his course to starboard, he could not change the single whistle to two blasts, notwithstanding the apparent change in the *Virginian's* course (App. 227, 1386. The *Strathalbyn's* pilot was required to act with positiveness so as not to baffle any effort on the part of the *Virginian* to avoid the collision, and was justified in assuming that the *Virginian* would see his lights until some contrary notice, by whistle or otherwise, from the *Virginian*, advised him to the contrary.

The Gary, 161 Fed. 420, speaks of the need of strict adherence to the rules of navigation. The rules say it shall be the duty of vessels meeting head-to-head or nearly so to each pass to the port side of the other. This is a mutual duty, and casts the burden on one vessel as much as the other. The court says the steamship had no right to assume "that the tug was going to proceed contrary to the rule and pass her starboard to starboard and on the wrong side of the channel." The court then cites cases where the non-observance of the rule has brought about collisions.

The Steamship Britannia vs. Elezabeth Cleugh, 153 U. S. 127; 38 Law. Ed. 660-665. It is the duty of a vessel to adopt a course and maintain that

course to prevent baffling the efforts of the other to avoid a collision by departing from the rule.

The Breakwater, 155 U. S. 252; 39 Law. Ed. 139-144. Exceptions to a definite rule should be admitted only when imperatively required by special circumstances.

The Marguerite, 87 Fed. 953. If the master of the preferred steamer were at liberty to speculate upon the possibility of a steamer failing to do her duty, certainty would give place to doubt and would produce a timidity and feebleness of action on the part of both masters which would bring about more collisions than it would prevent.

The William Chisholm, 153 Fed. 703-712. Her double blast would mean to the Chisholm, "I am directing my course to port." If she was in doubt of the intention of the other vessel, she was bound to give an alarm whistle and check, or stop and reverse, if necessary, as required by rule 26; but, if she gave no notice of any embarrassment, the Chisholm was entitled to assume that she had none and proceed accordingly.

The Devroe Powell, 165 Fed. 634. The pilot did not know that the tug had no lookout nor that the tug's master was unobservant of the movements of the ferry-boat. All he knew was that

the tug had twice failed to answer his signal and the vessels were approaching on crossing courses. The pilot insisted on his signals. A trifling change of the tug's helm to port would have sent her safely under the stern of the ferry-boat.

It is difficult to understand why the *Virginian* would swing her head to port. Other vessels have done so under inexplicable circumstances.

The Steamship Columbia vs. James H. Bunting, known as The Columbia, 10 Wall. 246, 77 U. S. 890. Here the *Columbia* was coming down the river on nearly paralleling, but converging, courses with the propeller *Jersey Blue*, but the *Columbia* swung to port so that she came directly in line with the propeller. Consequently held in fault.

The Brig Annie Lindsey vs. Daniel Brown, known as The Annie Lindsey, 14 Otto 185, 26 Law. Ed. 716. Here the two ships were meeting end on, and the brig violated the rule by not porting, but by putting her helm to starboard. She was held at fault.

The signal system of the *Virginian's* starboard engine caught and would not convey signals to the engine. Did her starboard telegraph get out of order on the stopping signal? And, when the engines were signalled to reverse, did only the port engine receive the signal, and in reversing threw the head

of the *Virginian* rapidly across the path of the *Strathalbyn*? It may be that the starboard engine was not stopped at the time the port engine was stopped and it was not stopped until the mate could go down on the deck below and signal to the engineer on the starboard engine through the speaking tube. By the time the *Strathalbyn* had blown her second whistle to the *Virginian*, she was headed in to the beach, and was so headed to clear the *Virginian*, if it was possible. At the time Capt. Beecher blew the *Strathalbyn*'s second whistle, the *Virginian* was swinging so as to close her red light (App. 226), and, at the third whistle, the red light had closed (App. 227), and it was not until after the second whistle that Capt. Beecher had reason to feel that the *Virginian* was not being carefully navigated. He then sounded one more single blast, so as to be sure that the *Virginian* knew his positive intention, expecting that her bad steering would be rectified, the vessels being easily far enough apart to justify this conclusion, but, that surmise being unjustified by the future conduct of the *Virginian*, he blew the danger signal when it became apparent the positions of the vessels involved danger of a collision, at which time the *Virginian* could have co-operated with the *Strathalbyn* by throwing her helm to port and have safely passed to the port side of the *Strathalbyn*. Capt. Beecher had a right to as-

sume that the officers on the *Virginian* would see what was visible, and, while they might not hear his first whistle, if they were attentive they should have heard his second and third.

We now wish to refer to a few authorities which show the action of the *Strathalbyn's* pilot above set out, was without fault.

(1) *The Wm. T. Frazier vs. The Wenona*, 19 Wall. 41; 22 Law. Ed. 52. "In speaking when the passing rules became applicable, the court says that the rules are inapplicable to vessels of every description while they are so distant from each other that measures of precaution have not become necessary to avoid the collision."

(2) *The New York*, 175 U. S. 187; 44 Law. Ed. 126, *supra*: "The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

(3) *The Thingvalla*, 48 Fed. 764. In connection with the navigation of the *Thingvalla* after seeing the *Geyser* approaching her head on, and turning to the starboard instead of port, the court says: "Whether or not she" (the *Geyser*) "would

realize that fact" (that is, her cross steering) "and alter her helm accordingly, the navigator of the Thingvalla could not know. An attempt on his own part to abandon the course, which the rules enjoined upon him in the one case and permitted him in the other, might, so far as he knew, tend to produce the very mishap it was intended to avoid. He did what the rules required of him when, seeing the mistaken maneuver of the Geyser, he stopped and reversed."

(4) *The Livingstone*, 113 Fed. 879, was held solely at fault where she could see the Traverse a quarter of a mile away, although he did not see her lights. "But we are unable to concur in the proposition that such fault was instrumental in producing the collision. The District Court found that when the vessels were a quarter of a mile apart and the third whistle of the Traverse was heard on the Livingstone, the vessels were in a position of safety which could be made unsafe only by the starboarding of the Livingstone. Had the latter ported or even held her course there could have been no danger." * * * "He could see the Traverse while her signal notified him as plainly as any lights would have done that she was directing her course to starboard." The Traverse was not held responsible for not backing, because,

at the time the Livingstone changed her course to port, she was *in extremis*.

(5) *The Stanford*, 136 Fed. 479 (*supra*), stopped and backed when her lights were not seen and she was held free from fault.

(6) *Lake Erie Trans. Co. vs. Gilchrist*, 142 Fed. 94. "That every vessel when approaching another so as to involve risk of collision shall slacken her speed, or stop or reverse, if necessary, is plain elementary law. So if one vessel be approaching another which has disregarded her signals or whose course or purpose is uncertain, she should check her speed or stop or reverse as the case seems to demand until her course is ascertained with certainty. * * * *The New York*, 175 U. S. 206, 44 L. Ed. 126; *Marsden on Collisions*, 434, etc." The *Rome* was not bound to anticipate that the *Mack* would not act lawfully and comply with her agreement, and, so long as there was apparent reasonable opportunity for her to swing and clear the *Rome*, the latter might assume that she would do so." * * * The *Rome* was held faultless. "When was the *Rome* chargeable with notice of risk of collision growing out of his disobedience? She realized that there was danger when they came within a thousand feet of each other and promptly ported. How long before that ought she to have regarded the *Mack* as too long in adhering to her

apparent original course? This direction to check, stop or reverse **when two vessels** are upon a course which involves risk of collision manifestly does not apply to a situation which is perfectly safe if no departure is made from settled principles of navigation whether imposed by statute or custom. "It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision."

(7) *The Lowell M. Palmer*, 58 Fed. 701. Here the Palmer persisted in blowing three signal whistles (as did the Strathalbyn) and the court held she was without fault in the following language: "Under these circumstances, the steamer is plainly in fault for not observing the whistles of the Palmer, for not going to the right as was her duty in that situation, and for making over, on the contrary, toward the Brooklyn side of the river. The Palmer seems to me to have done all that was incumbent upon her in the endeavor to avoid collision."

(8) *The Jay Gould*, 19 Fed. 765, 769. "The obligation to slacken speed whenever, by a false maneuver on the part of another vessel, a steamer incurs the danger of collision has been enforced in

numerous cases under circumstances very similar to those in the case under consideration.

(9) *Williamson vs. Barrett*, 13 How. 101, 14 Law. Ed. 68. "While these vessels were not on crossing courses, nevertheless the duty of each was to go to the right."

(10) *Steamship Favorita vs. Union Ferry Co.*, 18 Wall. 598, 21 Law. Ed. 856. "It is said if The Manhasset had advanced instead of stopping she would have cleared the steamship. This may or may not be true, but if true, she is not in fault for this error of judgment. If the Favorita had been where good navigation required her to be, or had she slackened her speed so as to be able to stop as soon as she discovered the Manhasset, the danger would not have existed, nor the accident happened. She is, therefore, in our opinion, chargeable with all the consequences that flow from this collision."

(11) *The Assilia*, 108 Fed. 975, page 980. "Under these circumstances, it does not seem reasonable the highest degree of promptness and certainty of action should be exacted of those navigating the Grathorne. They were confronted by a perplexing situation, brought about by no fault of their own."
* * * (and on page 981) "and when he could be sure that the Assilia was not going to follow the

channel, but under a hard starboard helm was heading him off, he stopped and reversed."

(12) *The Delaware*, 161 U. S. 459, 40 Law. Ed. 771. "Until the last moment, the tug had a right to assume that she (the Delaware) would comply with the rule."

(13) *The Steamship Nevada vs. Sergeant J. Quick*, 16 Otto. 154, 27 Law. Ed. 149 (particularly at the bottom of page 150 and top of page 151). "Perhaps they might have done something else which would have been better. The event is always a great teacher. * * * But these possibilities are not the criterion by which they are to be judged. The question is, did they do all that reasonable prudence required them to do under the circumstances?"

(14) *The Andrew J. Hutchinson vs. The Steamboat Northfield*, 96 U. S. 51, 24 Law. Ed. 680. On page 681 the court says: "The officers of each vessel had the right to assume that the other vessel would do its duty," etc.

(15) *Nichels vs. The Servia*, 149 U. S. 144, 37 Law. Ed. 681 (particularly at the bottom of page 686). "The Servia maintained her position close to the New York shore; she proceeded slowly; she observed the Noordland closely; she stopped her engines when at a safe distance to enable

the Noordland to check her own sternway; and she reversed her engines when the sternway of the Noordland indicated risk of collision. She was thwarted in her maneuvers by the faults committed by the Noordland. It was not incumbent upon the Servia to take any other precautions than she did; and she did nothing to bring on the risk of collision."

(16) *Belden vs. Chase*, 150 U. S. 674, 37 Law. Ed. 1218 (particularly page 1228, first column) where it appears from the opinion: "The Vanderbilt was bound to go to the right after the bargain was made by the exchange of single whistles." The rules of the supervising inspectors have the force of statutory enactment.

(17) *The Victory*, 168 U. S. 410, 42 Law. Ed. 519 (particularly on page 530, the upper part of the first column), where the court says: "The Plymouthian was entitled to rely on her repeated single blast to correct the error of the Victory until it was made apparent by the further cross signal or from her change of heading that she was persisting in a wrongful course."

(18) *The Wrestler*, 198 Fed. 583. "The collision being fully explained by the clear fault of the Wrestler, there is no reason to be astute in looking for fault on the part of the Transfer. The

cross-libellant contends the Transfer had no right to continue when the Wrestler did not answer her first signal, but I think the Transfer had no ground for failing to understand the intention of the Wrestler until he had received no answer to his second signal, which was immediately repeated. Then it did stop, blew an alarm, and reversed full speed astern. If the failure of the Transfer to stop and reverse sooner had in any way misled the Wrestler, there would have been some reason for inculcating the Transfer, but it did not."

(19) *The Schooner Maggie J. Smith vs. Samuel H. Walker*, 123 U. S. 349, 31 Law. Ed. 175. "Whether it would have been more prudent for the Robinson to take a different course in consequence of the dangerous position in which she was placed by the disregard of the statutory rule on the part of the Smith must depend upon the angle at which the vessels were approaching, their distance apart at the time, their combined speed, circumstances not disclosed in the record." * * *.

It may be asked: What would the Strathalbyn have accomplished by having blown her danger signal earlier? We answer: Absolutely nothing. The Virginian knew the Strathalbyn was approaching her; at least, they so thought at the time. They knew, by her continued whistling, that she desired the co-operation of the Virginian in passing. If

the testimony of the *Virginian's* officers is to be believed in connection with their engine operations, the *Strathalbyn's* danger signal would have done no good, for they say they stopped the engines on the first whistle to the *Virginian* from the *Strathalbyn*, and were going full speed astern when the second whistle was blown; that the jingle of the telegraph almost drowned sound. It was not until the second whistle that the *Virginian's* red light commenced to disappear. The distances then were not such as to involve risk of collision. Of course, Capt. Beecher was not in doubt of the location or course of the *Virginian*. He could see distinctly. And if the *Virginian* were in doubt of the course and location of the *Strathalbyn*, the rules require an immediate notification of that fact by the danger whistle, and, until that danger whistle was blown by the *Virginian*, the *Strathalbyn* had a right to assume that she could be seen and would be properly passed, as long as there was sufficient room for that maneuver. It isn't anything strange, on Puget Sound, for vessels approaching to neglect to answer a passing whistle from another vessel. The record in this case shows that this passing without signals took place in two instances. So we see that there was no real cause of alarm on the part of the *Strathalbyn's* navigator until he blew the danger signal.

Having shown that the Strathalbyn is free from fault, it is not hard to discover the fault in the Virginian. Her officers testify they heard two passing whistles from the Strathalbyn which they knew were intended for her. They knew that the Strathalbyn was approaching her from ahead. They knew that the Strathalbyn had approached the Flyer and had made a port to port passage with the Flyer. They knew there was no other vessel in the vicinity. The engine room log of the Virginian and the testimony of her officers on the bridge are so irreconcilably inconsistent that it is impossible to give credence to the bridge officers' statements. If the bridge officers are not intentionally falsifying, they are surely grossly mistaken. The engineer's testimony describes how signals to the engines are recorded in the engine room log the moment they are given, and the log shows that the stop signal was given at 7:57, the reverse at 7:58, and the collision occurred at 7:58. All the signals were given within the course of one minute. Yet Capt. Green, Mr. Duffy and First Mate McLeod all testify that two minutes or more elapsed after the engines of the Virginian were reversed before the danger signals came (App. 836, 891). We say Mr. Duffy so testifies. Probably in taking the whole of his testimony, that would be the conclusion; but Duffy is a very peculiar witness, and the first time that counsel started Duffy off to

tell his story and questioned him about the signals to the engine (App. 1160), he was asked:

“Q. How was your vessel going when you ordered her full speed astern? A. Full speed ahead.

Q. Did you stop her at any time between full speed astern and full speed ahead? A. No.

Q. Gave her no signal to stop? A. Oh, yes, I stopped her.

Q. When did you stop her? A. When I heard that whistle.

Q. Which whistle? A. The second whistle that I supposed was for me.

Q. You say the second whistle? A. I mean when he whistled to the Flyer.

Q. That is the first whistle? A. That is the first whistle.

Q. That is the first whistle to you? A. I supposed it was for me.

Q. It was at that time you stopped her? A. Yes.”

Then he testifies that he got his glasses and tried to pick up a light and says he didn't see anything.

(App. 1161):

“Q. Then what did you do? A. I ordered her full speed astern.

Q. About how long after you stopped her before you ordered full speed astern? A. Well, it would not be, I do not think, half a minute.”

On page 1162, he was asked:

“Q. State what happened after you heard the danger signal and answered with three blasts?

A. The ships came together. Well, I guess, it did not seem a half a minute. It was not very long.

Q. What was the effect of the blow upon the Virginian? A. It did not seem very much.

Q. Not very strong? A. No.

Q. Did it give the Virginian a list to either side? A. Just barely a list to port.”

(App. 1163):

“Q. Did the blow of the collision throw the Virginian off her course at all? A. Very little.”

Now, the engine room log shows that the Virginian's engines were stopped at 7:57 and went full speed astern at 7:58, when the collision occurred, and the interval that Pilot Duffy gives, of about a half a minute, is likely the correct interval between the stop and the reversing signal, for it does appear from the testimony of Capt. Beecher, Captain Crerar and others on the Strathalbyn that, a few seconds before the steamers collided, it was noticed that the back water was just commencing to show under the counter. The Virginian's engine room log and the testimony of the Strathalbyn's bridge officers harmonize. And it is significant that no whistles came from the

Virginian until after the Strathalbyn had blown her danger whistle. Then the Virginian blew three whistles, which they testified signified her engines were going astern. If the navigators of the Virginian had in mind signifying when the Virginian's engines were going astern by her whistles, and if, as a matter of fact, her engines were reversed two minutes before the danger signal from the Strathalbyn, then we could have expected them to have blown three whistles to indicate that fact two minutes before the danger signal. The rules require them to signal when their engines are running astern, and, in this particular, they violated the rules, if they were running astern two minutes before they signalled. The District Court felt constrained to accept the log of the Virginian as the true story of her engine manipulations. We can see no reason why that record should not be the conclusive one in this case, as it is made under authority of law at the time of the occurrence and is an admission against the interest of the party involved.

Again, the Virginian was negligent in the exercise of good seamanship.

The Cayuga vs. The Hoboken Land & Improvement Co., 14 Wall. 270; 20 Law. Ed. 828, says, among other things, in the opinion: "Persons engaged in navigating vessels upon the seas are

bound to observe the nautical rules enacted by Congress whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts." Admit, for the sake of the argument, that they could not see the Strathalbyn; that they were in doubt as to the course of the Strathalbyn; they knew they were on a regular course followed by all steamers between Tacoma and Seattle. They had heard the Flyer answer the Strathalbyn's first whistle and knew the exact location of the Flyer by her lights, and surmised that the Strathalbyn had passed or was passing her port to port and that the subsequent passing whistles were intended for the Virginian. They, therefore, knew substantially the Strathalbyn's position. It could not be any farther to the westward than the Flyer. It might be farther to the eastward than the Strathalbyn actually was; but the position of the vessels then was such that almost any course taken by any vessel on that run would bring the steamers substantially together. The Strathalbyn blew one whistle. The rules require that each vessel shall port on the exchange of whistles. The Virginian knew that she was expected to exchange whistles. She, therefore, knew she was expected to port. There is not a single situation where whistles would be exchanged under the circumstances that it would not be absolutely safe and required for the Virginian to port. The

safe course of conduct is always the course which is demanded by good seamanship, particularly in case of doubt. Capt. Burley, when asked what he would do under similar circumstances, cited the fact that he would have ported, as, by so doing, he would have gotten farther away from the position that the Strathalbyn would be in by doing as the rules required her to do, viz., port. The course suggested by Capt. Burley (and there is no superior pilot or more experienced one in these waters,) recommends itself for simplicity and safety so strongly that no argument can strengthen the suggestion. The *Virginian*, however, contends that she did not change her course in any manner, and so there is no room for argument that she was negligent in failing to do so, particularly if she could not see the lights of the Strathalbyn, for then she necessarily was in doubt as to the course and direction of the Strathalbyn, and should have tried to place herself as far out of the Strathalbyn's indicated course as it was possible, by every human endeavor, to do. On this phase of the case, it is not necessary to test the accuracy of the testimony of the Strathalbyn's officers, that the *Virginian's* head swung to starboard and followed the Strathalbyn to the point of collision, but as in every other feature of this case, there is direct conflict in the testimony between the crew of the *Virginian* and the crew of the Strathalbyn. The

crew of the *Virginian* testify they held their course after the *Strathalbyn* opened whistle signals with her until the collision. The crew of the *Strathalbyn*, who were watching the *Virginian* and conducting their navigation in view of her maneuver, testify that she swung to port after the whistle signals were opened. Two witnesses on the *Flyer*, *Baumont* and *Hofstetter*, testify that the *Virginian* had the appearance of swinging to port—*Hofstetter* because he saw the lights shining through the port-holes on the starboard side of the *Virginian* open more broadly than when he had looked at them previously, and *Beaumont* because he saw the red light on the *Virginian* disappear. Again, the eye witnesses on the *Flyer* corroborate the testimony of the *Strathalbyn*'s navigators, and we contend that the weight of the evidence and the probabilities of the case show that the *Virginian* took a course to port after the *Strathalbyn* whistled to her. Such navigation was negligent.

In addition to the above, the *Virginian* violated rule 3 of the congressional rules and rule 1 of the pilot rules. Rule 3 and rule 1 are alike so far as rule 3 goes, rule 1 only adding to it.

Rule 1, found on page 6 of the pilot rules, is as follows:

“Rule 1. If when steam vessels are approaching each other, either vessel fails to understand

the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, THE DANGER SIGNAL."

"Whenever the danger signal is given, the engines of *both steamers shall be stopped and backed* until the headway of the steamers has been fully checked, nor shall the engines of either steamer be again started ahead until the steamers can safely pass each other and the proper signals for passing have been given, answered, and understood."

The following is an excerpt from the testimony of Pilot Duffy, commencing App. 1181:

"Q. That is the first you knew what hit you?

"A. Yes. Well we did not know then what hit us.

"Q. You knew something hit you, didn't you?

"A. Yes, sir.

"Q. You knew you had been afoul of something?

"A. Yes, sir.

"Q. What did you suppose it was?

"A. We supposed it was a ship.

"Q. And you had not been able to pick her up at all during that time?

"A. No.

"Q. When the Flyer gave one whistle and the Stratthalbyn gave one whistle to the Flyer,

you knew that a vessel was whistling to pass the Flyer, didn't you?

"A. Yes; I knew there was something.

"Q. And that those vessels were passing port to port?

"A. Well, I supposed that was what it was.

"Q. That is what you supposed at the time was the case?

"A. Yes, sir.

"Q. Then, when they gave the next whistle from the Strathalbyn, you knew something was coming towards you from Tacoma, didn't you?

"A. Yes.

"Q. And that that whistle was a whistle for your vessel to pass port to port?

"A. Well, I suppose it was.

"Q. At that time you supposed it was?

"A. Yes."

"Q. Now, I suppose you were in some doubt as to what was ahead of you?

"A. Yes.

"Q. I suppose you were in doubt as to the direction that vessel ahead of you was going in, were you not?

"A. Yes, sir.

"Q. You were in doubt as to the course it was taking, too?

"A. Yes, sir.

"Q. And you were in doubt as to the speed she was going?

"A. Yes, sir.

"Q. The only whistles that were blown from your vessel at all were the three whistles that came after you heard the four whistles from the Strathalbyn?

"A. Yes.

"Q. Now, when these whistles were being blown, Captain, the Flyer was in plain sight of you all the time, was she not?

"A. Yes.

"Q. You did not know what they intended to do on board of the Strathalbyn at the time they whistled to you the first time?

"A. No, sir.

"Q. Who was in control of the navigation of the Virginian?

"A. I was pilot.

"Q. You had control?

"A. Yes, sir.

"Q. The man on the bridge who was giving orders and directions?

"A. Yes, sir.

"Q. It was Captain Green who blew the three whistles?

"A. Yes.

"Q. You did not give that direction?

"A. I did not give the direction for blowing the three whistles."

It appears Duffy knew the Strathalbyn was approaching, knew the one whistle signal was for him, and was in doubt as to the course, intention and speed of the Strathalbyn. This produced the exact situation demanding an immediate sounding of the danger signal.

The one idea most prominent in the mind after reading the rules above referred to is that if, for any reason, the Virginian failed to understand the Strathalbyn's course or intention, that the Virginian would immediately blow the danger. Therefore, when no danger was blown from the Virginian, the pilot on the Strathalbyn believed there was no doubt on the part of the Virginian as to the Strathalbyn's course and intention, since the Strathalbyn had opened the signals. The Strathalbyn's pilot, believing there was no danger in continuing on his course indicated by his one blast signal, believing that the Virginian would co-operate in making the port passage, could and should proceed on his course with firmness, and could and should hold it up to the last minute, unless he received a danger signal earlier to indicate the necessity of stopping and backing. The Virginian, therefore, had the whole situation in her hands. Had she blown the danger signal when the Strathalbyn

first blew to the *Virginian* or later, the *Strathalbyn* and the *Virginian* would have then both reversed and the two vessels would not have come together, for, as it was, the *Strathalbyn* and *Virginian* almost cleared. If the *Virginian* had performed the simple operation of tooting the danger signal when in doubt, the collision could not have occurred. The *Virginian* should be held at fault for misleading the *Strathalbyn's* pilot by her silence.

We have not attempted to cover in all detail the testimony of the numerous witnesses examined in this case. We have felt the need of epitomizing the voluminous testimony of numerous witnesses upon many points, and trust we have not unduly extended our remarks. We feel that the case will be better understood by the court after reading the testimony, and that many facts, favorable to the *Strathalbyn*, will occur to the court from such reading that have not been or will not be touched upon herein. We feel that, in so reading the testimony, the court will become thoroughly convinced of the honesty, uprightness and credibility of the witnesses produced by the *Strathalbyn*; that the court will not hesitate to say that, out of the conflict of evidence, the testimony greatly preponderates that the *Strathalbyn's* lights were properly set and burning, that her navigation was prudent, in accordance with the rules and entirely safe had

the Virginian co-operated by observing the rules and exercising good seamanship, and that the Virginian was solely at fault because of her wrongful navigation, the carelessness of her pilot or bridge officers, and the deficiency of her lookout. We respectfully ask that the court find the Virginian wholly at fault.

ASSIGNMENT OF ERROR XIV., XV. and XVI.

These assignments can be considered together, and if the court concludes that the Strathalbyn is relieved from liability to the cargo owner by their contract exempting the Strathalbyn from collision damage, then the error is well claimed; otherwise not. We acknowledge that the Harter Act does not relieve the owner of the carrying ship from liability to recoup the vessel held liable by the cargo owner of the carrying ship. The Harter Act has no application to the case at bar for the reason that the whole of the Strathalbyn was chartered, under a time charter, to the American Trading Company, which Company loaded the Strathalbyn and provided her pilot. She is a private carrier, and the relationship between her charterer and her owners is established by the charter party. This charter party exempts the Strathalbyn from liability to the charterer for damage arising from collision. The charterer could not sue the Strathalbyn directly because of his express contract but

could sue the Virginian as there is no express contract between the charterer of the Strathalbyn and the Virginian. When it becomes apparent that, through the operation of law, the Virginian is held at fault and claims the right to recoup from the Strathalbyn one-half of a judgment obtained by the cargo owner against her, at that moment it becomes obligatory upon the court to enforce the express agreement between the charterer and the Strathalbyn and limit the cargo owner's right of recovery to one-half of his loss and find that such one-half of his loss should be solely charged to the Virginian. In this consolidated proceeding, the court has jurisdiction of all the parties prior to rendering judgment, and can pass judgment so provisioned as to carry out, without harm to anyone, the express provisions of the contracts between the parties which are pleaded and admitted herein. We find that the case of *The Maine*, 161 Fed. 401, distinguishes *The New York*, 175 U. S. 187; 44 Law. Ed. 126 (and other cases following the rule there laid down as to the right of the vessel sued by the cargo owner to recoup from a public carrier vessel), from the case of a private carrier, and it was held that the libellant, having contracted for an exemption, was not entitled to recover more than half damages against the Maine, the joint tort-feasor rule not being applicable. We, therefore, submit that the Honorable District Court

was in error in rendering judgment against the Virginian in favor of the cargo owner for more than one-half of the cargo owner's loss, and in decreeing the full amount of the damage against the Virginian, with a provision that the Virginian recoup one-half thereof from the Strathalbyn.

Respectfully submitted,

HUFFER & HAYDEN,

W. H. HAYDEN,

F. A. HUFFER,

Proctors for Strathalbyn Steamship Company, Ltd.,
Appellee and Cross-Appellant.

Tacoma, Washington.

No. 2728

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration,

Appellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration, as bailee of a cargo of lumber consisting of
3,563,011 feet, and for the use and benefit of the owners
and insurers of said cargo,

Appellee and Cross-Appellant,
STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration,

Appellee and Cross-Appellant.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

BRIEF OF APPELLANT AND CROSS-
APPELLEE ON CROSS APPEAL

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration,

Apellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration, as bailee of a cargo of lumber consisting of
3,563,011 feet, and for the use and benefit of the owners
and insurers of said cargo,

Appellee and Cross-Appellant,

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration,

Appellee and Cross-Appellant.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

BRIEF OF APPELLANT AND CROSS-
APPELLEE ON CROSS APPEAL

We have been served with "Brief of Appellee and
Cross Appellant" which purports to be the brief of the
Strathalbyn Steamship Company, Ltd., on its cross-ap-

peal. The Rules of this Circuit do not clearly define the steps necessary to be taken by a party in an Admiralty proceeding who desires to take a cross-appeal. In the case at bar the Final Decree was entered on November 26th, 1915. On the same date the American-Hawaiian Steamship Company as owner of the S. S. Virginian, Claimant and Cross Libelant below, filed its Notice of Appeal and thereafter duly perfected its said appeal. The expense of this appeal paid by this appellant amounted to Two Thousand Six and 55/100 Dollars (\$2,006.55), the items of which are shown on page 1457 of the Apostles.

On the 23d day of December, 1915, the Strathalbyn Steamship Company, Ltd., as owner of the S. S. Strathalbyn, filed its Notice of Appeal. The said Strathalbyn Steamship Company, Ltd., also filed with the Clerk of the Court below its Assignments of Error, Bond on Appeal and Citation on Appeal, which together with its Notice of Appeal constitute the so-called Cross-Appellant's entire Transcript of Record on Appeal. At the request of "Cross Appellant" its appeal papers were printed under the same cover as Appellant's Apostles on Appeal (pp. 1459 to 1469). So far as the record shows, no "Praeceptum for Apostles on Appeal" were ever filed by "Cross Appellant." The entire cost to said "Cross Appellant" in connection with its so-called cross appeal was less than Twenty Dollars (\$20.00), the exact amount being shown on page 1469 of the Apostles.

We submit that under these circumstances the said Strathalbyn Steamship Company, Ltd., is not properly before this Court as a Cross Appellant. If this Court should hold that the said "Cross Appellant" is properly before this Court, then we submit that in the event of an affirmance by this Court of the Decree below, that the entire costs of both parties on this appeal should be divided. It would be clearly inequitable and foreign to all principles of Admiralty law to require this appellant to stand practically all the costs of this appeal in case it is unsuccessful and to allow the cross appellant to take full advantage of the Record in this case (procured at a cost of over Two Thousand Dollars by Appellant) on its cross-appeal and in case it is unsuccessful on its said cross-appeal to require it to stand practically no costs whatever.

If cross appellant is before this court at all, it is on an equal footing with appellant and in case both parties are unsuccessful on their respective appeal, they should each be required to stand an equal portion of the costs on this appeal.

Many of the statements in cross-appellant's "Statement of Facts" are not sustained by the evidence in this case. For instance on page 4 it is stated that the "evidence shows the collision occurred at 7:58 by the engine room time of the 'Virginian.'" On the contrary, the positive testimony shows that the "Virginian" reversed at about 7:58 and that the collision occurred

from one to one and a half minutes thereafter or between 7:59 and 8:00 o'clock, as we have shown in appellant's main brief. And again on page 5 it is stated that "when passing the 'Virginian' the 'Flyer' saw the 'Strathalbyn' between Robinson and Pully Points." On the contrary the evidence shows that the "Flyer" first saw the "Strathalbyn" (or a white light aboard of her) some time *after* passing the "Virginian" and when well off the "Virginian's" starboard bow. Again it is stated on page 5 that "when the 'Strathalbyn' was from 1200 to 1500 feet forward and off the 'Flyer's' port bow" she blew her first whistle to the "Virginian" "and ported her helm, directing her course to starboard," the "Virginian" at that time being "in the neighborhood of a mile off." The testimony of the "Strathalbyn's" navigating officers is that when she blew her first whistle to the "Virginian" that the "Flyer" was either *abeam* or *abaft the beam* of the "Strathalbyn." It also clearly appears from an overwhelming preponderance of the evidence that the "Strathalbyn" did *not* direct her course to starboard either at the time of blowing this whistle or at the time of blowing any of her other passing whistles to the "Virginian" and the lower court has so found. (Apostles, p. 1427.) It is also clearly shown by the evidence that the "Virginian" was considerably less than a half mile off at this time.

It is further stated on page 6 that the "Strathalbyn" was stopped prior to the collision and that "but a few

seconds elapsed between the 'Virginian's' three short whistles and the collision." The evidence shows that the "Strathalbyn" was not stopped prior to the collision but that she had a slight way on her *at the time of* collision. It also shows that the "Virginian's three whistles were given about one-half a minute before the collision.

The statements that the "'Strathalbyn' had swung from her course until she was headed well into the light to the eastward of Pully Point" (pp. 6-7), and that the "'Virginian' struck the 'Strathalbyn' on the port bow," etc., are both clearly disproven by the great preponderance of testimony and were found to be untrue by the court below. (Apostles, p. 1427.)

These statements and others in cross appellant's brief and the testimony to which we have referred as disproving the same will be considered later on in this brief—many of them have been refuted in appellant's opening brief.

The only points argued at any length in cross-appellant's brief are:

- (1) Visibility of the "Strathalbyn's" lights.
- (2) Navigation of "Strathalbyn" immediately prior to collision.
- (3) Navigation of "Virginian" prior to collision.

We will take these points up in the order in which they are discussed in cross-libelant's brief.

VISIBILITY OF THE "STRATHALBYN'S" LIGHTS

(A) GENERAL CHARACTER OF "STRATHALBYN'S" LIGHTS.

Cross appellant contends that the "Strathalbyn's" lights in use on the night in question in every way complied with the Inland Rules as to brilliancy—that her side lights were not obstructed by her cargo stanchions or in the alternative that if they were obscured that the obscuration was not to exceed two degrees from straight ahead and that as these vessels were approaching each other at an angle exceeding three degrees, the side lights should have been visible to the "Virginian." They further contend that the "Virginian" should have seen the "Strathalbyn's" masthead light in any event.

We take issue vigorously with each of these contentions and an impartial reading of the voluminous testimony on the subject of the "Strathalbyn's" lights, the obscuration of her side lights and the angle of approach and contact of the "Virginian" and "Strathalbyn" will show not only that cross appellant's contentions are contradicted by the overwhelming preponderance of the testimony but that it is conclusively proven by said testimony that the "Strathalbyn's" signal lights were very dim oil lights; that her side lights were obscured by her cargo stanchions over an arc of *at least*

two degrees from straight ahead and that these vessels approached each other and collided head and head or practically so. The lower court after a careful, painstaking and impartial study of this evidence, has so found. (Apostles, pp. 1416 to 1429.) There is very little to be added to the lower court's findings on these points.

It is a significant fact that cross libelant considers it necessary to take up approximately its entire brief in an attempt to establish its contentions as to the "Strathalbyn's" lights.

There are certain outstanding facts in connection with these lights testified to by the "Strathalbyn's" own witnesses, which immediately cast suspicion upon these lights.

The "Strathalbyn" was fitted with an electric mast-head light properly positioned above the cross trees of her main mast; she was fitted with an electric range light properly positioned on her after mast; she was fitted with electric side lights properly positioned in light boxes on her flying bridge some 24 feet above her main deck and well clear of any cargo which she could possibly carry on her forward deck; she was also fitted with an electric stern light. At the time of leaving Tacoma on the night of the collision, her electric dynamo was out of order and had been for some four or five days previous thereto, and in place of her electric signal lights she was using temporary oil lights which had been

furnished the ship by her buiders some two years and four months prior to this time and which oil lights had never previously been used as ship's lights. These temporary oil side lights were placed on either end of her lower or chart room bridge, being the bridge immediately below her flying or navigating bridge, said bridge being only 16 feet above her main deck and admittedly at least four feet below the top of her cargo stanchions. The temporary oil masthead light was hoisted to a point on her main mast about a foot below the cage in which her regular electric masthead light was fixed, without any cage to hold it steady. No light of any kind was placed on her aftermast as a range light. The testimony doesn't show exactly how the stern light was positioned except that it was placed at the after end of the ship. The testimony further shows that prior to leaving the port of Tacoma that no officer aboard the "Strathalbyn" inspected these lights or tested them to see that they were in proper condition. As far as the testimony shows the only person aboard the "Strathalbyn" who even saw these lights prior to the time they were put in actual use upon leaving Tacoma, was a seaman by the name of Taylor, who testified that he lighted them for half an hour in the afternoon and trimmed the wicks. The master of this steamer not only did not inspect them, but gave no orders for them to be tested and did not know of his own knowledge that they had been tested. (Apostles, p. 255.) He didn't know what oil was being used in them, nor did he see them put up prior to sailing.

(Apostles, p. 256.) The first officer didn't inspect them nor did he know of his own knowledge that they had been tested. (Apostles, p. 290.)

He didn't even know who put these lights up as they were sailing, nor did he know when they were put up. (Apostles, p. 307.)

"Q. But I asked you whether you were there and saw them when they were put out?"

"A. I blew my whistle and it is their duty to light the lamps and put them in position. I don't see who put them in position. I would see them cutting along the deck." (Apostles, p. 307.)

The second officer didn't testify in this case. So far as the testimony shows the third officer didn't see any of these lights until after the collision, certainly he did not inspect or test them prior to leaving Tacoma. No other officer from the "Strathalbyn" testified in this case.

The seaman Taylor testified that he tested these lights in the afternoon before sailing under the supervision of the third mate (Sterling) (Apostles, p. 335), and upon orders received from the Bos'n (Walter-son). Neither the third mate nor the bos'n corroborate this testimony.

He testified that all these lights had been used and the wicks were burned, though they had never been used as ship's lights, that he took out the old wicks and replaced them with new wicks which were furnished him by the third mate. (Apostles, p. 339,

p. 342.) The third mate *does not corroborate him on this important point*. After burning the lights for half an hour they were put away and that as they were heaving the anchor to leave port he heard the order "lights out" (Apostles, p. 343), that this was ten to fifteen minutes before the ship actually started on her voyage; he let them burn awhile to see "if they smoked and put the wicks down a little" (Apostles, p. 335), that he then passed them to various members of the crew with the exception of the stern light which he put out himself. (Apostles, pp. 343-4.) This was about six o'clock; and the next time he looked at the stern light at about 7:20, the stern light was out. (Apostles, p. 344.) He relit it and immediately replaced it. However when the "Indianapolis" passed the "Strathalbyn" at about 7:45 *this stern light was out again*. (Apostles, p. 1013.) It was out immediately after the collision and was also out at 10:05. (Apostles, p. 1010.) The witness explains this fact of it going out the first time by saying that he had given it *too much ventilation* and that when he relit it he closed the cap down. (Apostles, p. 349.) We would invite the court's attention particularly to the testimony of this witness. His testimony is not corroborated on a single point by either the third mate or the bos'n, both of whom he claims were present when he tested these lights in the afternoon; it is contradictory in several important particulars. He testified that he tested these lights immediately after

dinner (App., p. 338) that they finished dinner at one o'clock (App., p. 349). On direct examination he testified that he tested them "between three and half past." (App., p. 335.) On page 341, he testified that he trimmed these lamps, lit them and then retrimmed them by cutting off the "ragged ends," while on page 342 he testifies that they were all right the first time he lighted them and that they were not retrimmed.

A careful reading of this witnesses' testimony leaves one in considerable doubt as to whether he actually did test these lights at any time prior to the time the ship sailed.

The testimony of seaman Lundberg (App., p. 157) shows that after the collision *the starboard side light was out*. He fixes this time definitely as a few minutes after the collision, right after they had lowered the second boat (App., p. 157), and before the "Flyer" came alongside. (App., p. 163.) He says the third mate took this light out of its screen and ordered witness to relight it; that witness took the light into the wheel house, relit it and handed it back to the third mate who put it in its screen. (App., p. 162.)

The third mate testifies that he "heard someone from the bridge say that the starboard light was dim" so he ordered a sailor to take it in and trim it; that when the sailor took the light out of the screen it was burning dimly, that the sailor took it into the wheel

house, *trimmed it* and replaced it. (App., p. 359.) The mate was not very definite as to the time this took place but he thought that it was an hour or more after the collision. Immediately after noting the condition of the starboard light, the third mate ordered the bos'n to "take down the masthead light and have a look at it." (App., p. 360.)

"Q. Did you notice that he did so?

A. I did.

Q. Did you go forward at that time to see the masthead light?

A. Yes sir.

Q. Did you observe it?

A. Yes sir.

Q. What was done with it?

A. He simply lifted the top and looked in and put it up again.

Q. He did not trim it?

A. No.

Q. Or touch the wick?

A. No.

Q. Is that the only time that you know of the masthead light having been looked at, after the accident?

A. Yes, that is the only time.

Q. And that was after your attention had been called to the starboard light being dim and you had fixed it?

A. Yes sir, it was after."

(Sterling direct examination, App., p. 360.)

On cross examination this witness testified concerning the position of the caps at the top of the lamp by means of which the lamp is ventilated.

"Q. Did you notice what position these caps were in at that time when he let it down?

A. Yes sir.

Q. What position were they in?

A. The same as now.

Q. Lifted up a little?

A. No, down.

Q. They were down then entirely?

A. Yes sir.

Q. So as to shut out any draft at all?

A. Yes.

(App., p. 363.)

Q. You did not order him to go up and have a look at it simply without taking it down?

A. No.

* * *

Q. If he had gone forward and looked up at it he could have seen whether it was burning all right without taking it down?

A. He could see the lamp better if he took it down; and what I wanted him to do was to see that the lamp was burning brightly."

(App., p. 364.)

The Bos'n (Walterson) in his original examination did not mention the fact that he had taken this masthead light down and examined it upon the order of the third mate. After this fact had been brought out upon the third mate's examination however, he was recalled and testified that he lowered this light "lifted the top and looked down, saw it was burning all right and hoisted it." (App., p. 369.) He did not stand in front of the light to see how it was shining through the globe, as would have been natural if all he desired was to satisfy himself that it was giving sufficient light. He couldn't tell by looking down on the light through the opening at the top of the lamp, whether or not the light was shining forward or whether the globe was smoked. He testified that after

looking down on the light he left this cap loose or slightly raised to give the lamp ventilation.

“Q. The reason you left it that way was so that it could have a little ventilation?

A. *All lamps need a little ventilation* like that.

Q. You did not examine the globe at all, but just looked at it from the top.

A. Just looked down from the top.”

(App., p. 370.)

The testimony of the third mate shows that when the masthead light was lowered the cap was shut down *tight*—the testimony of the bos’n shows that *after* he had examined this light he left the cap loose to give the lamp necessary ventilation in other words that prior to this time the lamp had had *no ventilation whatever* which explains its smoky and “smutty” condition as testified to by Mr. Jackson of the tug “Sel-mora.” (App., p. 1107.)

These admitted facts as to the general condition of the “Strathalbyn’s” lights is enough to condemn them. Of the four lights in use on this night—two side lights, masthead and stern lights—the stern light went entirely out at least twice prior to the collision—the starboard light either went entirely out or was burning so dimly that it had to be trimmed and re-lighted—the masthead light had to be lowered and given more ventilation. It is a strange thing that the port light was the only *perfect* light aboard the “Strathalbyn.” The court will see from an examination of these lights which are in evidence, that they

are all of similar construction—if three of them were admittedly defective, will this court believe for a minute that the other light (port) was not also defective?

(B) TESTIMONY AS TO THE “STRATHALBYN’S” LIGHTS.

The burden of proof was on the “Strathalbyn” to establish the sufficiency of her lights. Marsden’s *Collisions at Sea*. (6th Ed.), p. 37.

The testimony as to the visibility of the “Strathalbyn’s” lights is so voluminous that it will not be practicable to consider the same except in the briefest manner.

“Prior to reaching the point of collision, the “Strathalbyn” met and passed on her starboard, near Brown’s Point, the steamers “Indianapolis” and “Daring.” The “Indianapolis” later overtook and passed to starboard of the “Strathalbyn” at Robinson’s Point a few minutes before the collision. The “Strathalbyn” met and passed port to port the steamer “Flyer” immediately before the collision. After the collision, the “Salmora,” a 30-ton gasoline tug, passed between the “Virginian” and the “Strathalbyn,” about 150 yards away from the “Strathalbyn,” a little nearer the “Virginian.” (Ap., p. 1417.)

The material witnesses on the question of the “Strathalbyn’s” lights prior to the collision can be conveniently referred to as

- (1) Crew of S. S. “Daring,”
- (2) Crew of S. S. “Indianapolis,”
- (3) Crew and passengers on S. S. “Flyer,”

- (4) Crew of "Virginian,"
- (5) Crew of "Strathalbyn."

Before considering the testimony of the above witnesses from the various vessels, we will consider the testimony of the three witnesses who claim to have seen one or more of the "Strathalbyn's" lights prior to the collision.

The testimony of Mr. Strand, is quoted fully by the lower court in its memorandum decision (Ap., pp. 1423-25). Mr. Strand testified, as it is there shown, that he stood on the Commercial Street bridge at Tacoma for half an hour watching the "Strathalbyn's" lights while she was lying at anchorage, and that both of the side lights were visible to him at the same time. In view of the testimony of Taylor, quartermaster of the "Strathalbyn," who testified that he put out the lights as they were heaving the "Strathalbyn's" anchor a few minutes before she sailed, the conclusion of the lower court that Mr. Strand was "doubtless mistaken," is fully justified by this evidence.

The testimony of Wm. J. Ward and his wife was to the effect that they were standing on Pully Point on the night of the collision, and saw the lights of the "Indianapolis" and another vessel approaching from the vicinity of Robinson's Point about 15 minutes off, that they were familiar with the masthead light of the "Indianapolis," and saw another bright white light in the same vicinity. Neither of these witnesses testi-

fied that they saw the side lights of either the "Indianapolis" or of the other vessel. The evident intent of this testimony was to show that the "Strathalbyn" was the other vessel in company with the "Indianapolis," and that her masthead light was as bright or brighter than the masthead light of the "Indianapolis." They both testified that as the "Indianapolis" passed *behind or on the port side of this other vessel* which they thought was the "Strathalbyn," and that the "Indianapolis'" cabin lights and masthead light were hidden. (Ap., p. 197, p. 201.) This testimony entirely fails in so far as it seeks to prove the brightness of the "Strathalbyn's" masthead light—because it is positively shown by their testimony that this light could not have been on the "Strathalbyn." The "Indianapolis" carried range lights—these witnesses only saw one white light on her. (Ap., p. 200.) Undoubtedly the "Indianapolis'" range light was the "other" white light seen by them. The testimony of the master of the "Indianapolis," as well as the officers of the "Strathalbyn," shows positively that the "Indianapolis" passed the "Strathalbyn" on the starboard side, so that the "Indianapolis" was at all times between Pully Point and the "Strathalbyn." (Ap., p. 981.)

(1) The first material witnesses in point of time were the officers and crew of the "Daring," which met and passed the "Strathalbyn" somewhere between

Brown's Point and the City of Tacoma. These witnesses were all produced by appellant.

Capt. McDowell, master of the "Daring," had been a seafaring man for 15 years. On the night of January 12, 1912, the "Daring" was on a run from Seattle to Tacoma. The master was off watch at the time his vessel met the "Strathalbyn," Smith, the first mate, being in charge. The master was in his room on the port side of the vessel when he heard two whistles which were not answered by the mate. That his vessel was just entering the harbor of Tacoma at this time (Apostles, p. 953). He testified that when he heard these whistles he came out on deck to see why his vessel had not answered, and that the mate told him that he could not see any vessels on which these whistles had been blown. That at this time he saw a little white light moving along against the background of the stationary lights of the City of Tacoma, and he ordered the mate to put his wheel over to give this vessel further clearance, but he could not at this time see any side lights. That the only light which he could see was a little white light, evidently hung over the bow, and that from this light he could make out the loom of a dark object moving along. He further testified that he did not see the side lights of the "Strathalbyn" until he was almost abeam and not more than 500 feet away, and that this was a green light,—whether oil or electric he was unable to say, "but it

was a very poor light for a big steamer like that." That this starboard light was a dim light compared with the lantern which was hanging over her bow. He further testified that the only way he was able to make out the loom of this vessel was because she was passing between the "Daring" and the stationary lights of Tacoma. (Apostles, p. 954, p. 955, p. 959.)

A. L. McMillan, lookout on the "Daring," testified that between 6:30 and 6:45, he noticed a dark object moving across the lights of Tacoma, "and I reported there was a vessel coming out there with no lights that I could see at that time." That the "Strathalbyn" was then not over a quarter of a mile away. That when they were a little closer he saw a lantern hanging over her forecastle head, and when nearly abeam, for the first time he saw her green light. He testified that this light was a "dim light for an oil light, or any other kind of a light for that matter." (Apostles, pp. 961-2-3.) This witness also saw her masthead light when they were very close together. He testified that this light was "a dim light—it was a very dim light like the rest of the lights they had on her." That the lantern hanging over her bow was a brighter light than either her masthead light or side lights.

L. E. Stone, chief engineer of the "Daring," testified to the same effect. (Apostles, pp. 968 to 973.)

Wm. H. Smith, first officer of the "Daring," testified that he was on watch as his steamer was getting into the port of Tacoma. That about 6:45 p. m., he heard two whistles, but was unable to see any lights, and that a little later he made out a dark object passing across the stationary lights of Tacoma. The witness testified that he did not answer her whistles when he first heard them because he could not tell where they came from, and could not see the vessel which was whistling. That he afterwards saw two lights on the forward part of this vessel, one of which was a lantern hanging over her bow. That he did not see any side lights until they were nearly abeam, when he saw a very dim green light. The witness further testified as to the character of these lights "that they were very dim, and the green light didn't show up until we were right abeam, since the vessel having crossed our bow and swung up into a position parallel with us, it was something to be noticed." (Apostles, pp. 1279 to 1282.)

These witnesses are absolutely unbiased, and have no interest whatever in the outcome of this case. They are all marine men, familiar with maritime matters, and, as was natural, upon hearing an unknown and invisible object blow two whistles, they were upon the alert to pick up her lights in order to determine what course she was on. They all testify that they made out this dark object moving across the stationary lights

of Tacoma, and that they were unable to see any of her lights until the vessels were nearly abeam.

Cross appellant contends in its brief that Capt. Penfield of the "Indianapolis" saw this same green light when it was about $\frac{3}{4}$ of a point off her bow, and that, therefore, it should have been seen sooner by the crew of the "Daring." The court will note that Capt. Penfield of the "Indianapolis" testified that he first saw this green light *with his glasses* when it was $1\frac{1}{4}$ points off the starboard bow, and that it was "a pretty dim light at first;" that he could not see it with the naked eye until it was up "pretty well abeam" (Apostles, p. 977), which testimony directly corroborates the testimony of the witnesses from the "Daring."

It will further be noted from this testimony that the "Daring" did not meet the "Strathalbyn" until between 6:30 and 6:45 p. m., at which time the "Strathalbyn" was straightened out on her course to Robinson Point, having left Tacoma, according to her own testimony, somewhere between 6 o'clock and 6:10, and being off Brown's Point at 6:35. (Apostles, p. 285.)

(2) The "Indianapolis" met and passed the "Strathalbyn" the first time shortly after the "Daring" had passed the "Strathalbyn."

Captain Penfield, Master of the "Indianapolis" who is a licensed pilot for the Inland Waters of Puget

Sound of over twelve years' experience, testified that he met the "Strathalbyn" near Brown's Point as she was coming out of the harbor of Tacoma. The "Strathalbyn's" masthead light *moving across the stationary lights of Tacoma* first attracted his attention. (Apostles, p. 976.) That he could not see any other lights on her nor could he see the loom of the vessel itself.

"Q. After that, Captain, did you see any other lights on the 'Strathalbyn'?"

A. Not until I got pretty close to her.

Q. Then what lights did you see?

A. I saw her side light.

Q. Which one?

A. Starboard side light.

Q. About how far away were you when you saw that?

A. Oh, about a quarter of a mile.

Q. Were you ahead of her or abeam?

A. Practically ahead.

Q. About how many points off was the bearing of this light?

A. It was about a point and quarter, something like that, on my starboard bow.

Q. How did you pick that light up, Captain?

A. I saw it first with my glass.

Q. Picked it up with the glasses?

A. First, yes.

Q. You could still see the headlight, could you?

A. Yes, sir.

Q. And you were looking for side lights?

A. Yes, sir.

Q. What kind of a light was that, Captain?

A. The starboard light?

Q. Yes.

A. What kind of a light was it?

Q. I don't mean as to color, but as to brightness?

A. Well, it was pretty dim at first.

Q. Would you call it a dim light?

A. Yes, sir.

Q. How far were you away before you saw it with a naked eye, Captain?

A. *Well, I could not say exactly; up pretty well abeam.*

Q. *Pretty well abeam of her?*

A. *Yes, sir.*" (Apostles, p. 977.) (Italics ours.)

After meeting and passing the "Strathalbyn" off Brown's Point the "Indianapolis" proceeded to Tacoma and left Tacoma at 7 p. m. on her return voyage to Seattle. She overtook and passed the "Strathalbyn" north of Robinson Point coming up astern of the "Strathalbyn" no lights were visible (*her stern light being out*). Coming up close to her Captain Penfield saw a dark object on the water and *thought it was a sail boat*. (Apostles, p. 981.) Passing her to her star-board the witness saw her green light when abeam.

Q. How far off were you when you saw this light?

A. The green light.

Q. Yes, how far off from the 'Strathalbyn'?

A. I was pretty close to her; may be, well, inside of 50 yards, I guess.

Q. How did the light appear at this time, Captain?

A. It appeared a little brighter to me.

* * *

Q. Did you watch the green light as you passed him?

A. Yes sir.

Q. And for how long a time could you see it.

A. Oh, probably inside of a quarter of a mile after I passed him.

Q. Then what happened to it?

A. It commenced to fade away again. Acted about the same when I was leaving it as it did when I was coming upon it at Robinson's—Brown's Point, rather.

Q. What do you mean by that?

A. It seemed to fade away as if something was obscuring the light." (Apostles, p. 982.)

The witness also noticed the "Strathalbyn's" mast-head light at this time and testified that it was "a dim light." (Apostles, p. 983.) As to the general appearance of the Strathalbyn, this witness testified, "well she was very deceiving, couldn't tell what she was or what it was, whether it was a scow or a sail boat or—the general appearance of the ship was deceiving on the water, you couldn't tell which way she was heading or anything else about her, whether you were meeting her head on or going up astern of her."

"Q. Unless her lights were visible, you think she would be a hard vessel to pick out, coming head on, do you?

* * *

A. Yes sir." (Apostles, p. 984.)

The witness testified that after passing the "Strathalbyn" he met and passed some distance off the "Flyer" and the "Virginian" prior to reaching Pully Point; that upon coming abeam of Pully Point he did not change his course as usual but continued on his same course so that he could keep these vessels in view, *as he was looking for trouble among those boats because of "the bad lights that the 'Strathalbyn' had and her general appearance on the water."* (Apostles, p. 985.)

Captain Penfield is a master of long experience on the Inland Waters of Puget Sound—he is a man well known and of undoubted veracity. He is an impartial

and unbiased witness. Having met and passed the "Strathalbyn" once and having overtaken and passed her once prior to the collision, he was in a better position to testify as to her lights and general appearance than any other witness who has been called in this case. His testimony is corroborated on every point by Phillips, quartermaster of the Indianapolis. (Apostles, pp. 1010 to 1027.) Mr. Phillips (who was in the pilot house of the Indianapolis with Captain Penfield) testified that he didn't see the "Strathalbyn's" masthead light when meeting her off Brown's Point until she was "about an eighth of a mile or so away" when his attention was called to it by Captain Penfield. (Apostles, p. 1011.)

Q. When did you first see her green light?

A. Well, I guess about a minute or so after that.

Q. A minute or so, about how far away was she at the time?

A. Well, I don't know, a little less than an eighth of a mile; she hadn't come much closer then.

Q. What was the bearing of the green light when you first saw it?

* * *

A. Well, about four points off our bow. * * *
The starboard bow.

Q. What was the appearance of that green light, Mr. Phillips?

* * *

A. The appearance?

Q. Yes, was it a bright light or a dim light?

A. Oh, it didn't appear—it appeared dim, because I had to look at it through the glasses; *I didn't see it with the naked eye at any time.*

Q. You didn't see it at any time with the naked eye.

A. No sir.

Q. About how close did you pass the "Strathalbyn"?

* * *

A. Well we wasn't much closer than an eighth of a mile, we hadn't come any closer; that was about as close as I saw her.

Q. *You could not see the green light at that distance with the naked eye?*

A. *No sir.*" (Apostles, pp. 1011-1012.) (Italics ours.)

Witness testified that the masthead light at this time "was not exactly dim; it was not bright either." (Apostles, p. 1013.) At the time of overtaking the "Strathalbyn" north of Robinson Point about 7:45 witness did not see the "Strathalbyn" until Captain Penfield called his attention to it "he thought it was a sail. I didn't see any lights."

"Q. This vessel had no stern light then?

A. No sir, no light." (Apostles, p. 1013.)

They could not make out the "Strathalbyn" until a couple of ship lengths away. Upon passing the green light appeared brighter. "I saw it at a different angle." (Apostles, p. 1014.) That as the "Indianapolis" passed ahead, this green light got dim and began to close out when it was about two points abaft the "Indianapolis" beam (Apostles, p. 1014). Witness testified that after passing ahead of the "Strathalbyn" and after meeting and passing the "Flyer" and "Virginian," Captain Penfield ran by his regular course from Pully Point, *so that he could keep these vessels in sight; that he was continually looking back saying, "there is liable to be a mix*

up." (Apostles, p. 1016.) As to the "Strathalbyn's" general appearance he stated "we couldn't make out her hull until we got up close, there was no lights burning and it was a dark night." (Apostles, p. 1016.)

(3) After the "Indianapolis" had overtaken and passed the "Strathalbyn" north of Robinson Point, the next vessel to meet the "Strathalbyn" was the steamer "Flyer," a small Sound steamer operated by the same company and on the same run as the "Indianapolis." Captain Burns was master of the "Flyer," L. Crawley, quartermaster, at her wheel and Harry Ashurst on the lookout. They have all testified in this case. Captain Burns testified that the "Flyer" passed the "Virginian" off Pully Point; that he came up astern of her, ported his helm and passed on the "Virginian's" starboard side about 250 feet off (Apostles, p. 174) and continued on this course to starboard (SExS½S) until he was abeam of the "Strathalbyn" (Apostles, p. 177). This is clearly shown on the drawing made by witness, Respondent's Exhibit 1. When the "Strathalbyn" blew to the "Flyer" the "Virginian" was from 6 to 7 points off "Flyer's" stern. (Apostles, p. 177.) In other words the "Flyer" was steering a more westerly course than the "Virginian" and was at all times well off the "Virginian's" starboard bow and well off the "Strathalbyn's" port bow. This is important in considering some of the testimony given by passengers on the "Flyer." On this course Captain Burns saw, some time after passing the "Vir-

ginian" and prior to receiving a passing signal from the "Strathalbyn," what he took to be the *range lights* of the "Strathalbyn"—according to his testimony this was *about the time* he received her signal. (Apostles, p. 177.) He estimates that the "Strathalbyn" was about a mile to a mile and a half away at this time, but states that it would be impossible to accurately judge distances on such a dark night. (Apostles, p. 185.) In an affidavit executed by the witness a few days after the collision, which is in evidence as Respondent's Exhibit 2, he stated "that after getting about an eighth of a mile past the 'Virginian' he observed the range lights of the 'Strathalbyn' * * * *that the range lights on the 'Strathalbyn' were dim, but being well off he was able to see them just prior to the time when the 'Flyer' gave the passing signal as aforesaid.*"

It is admitted by the "Strathalbyn" that she carried no range light. The material part of Captain Burns' testimony is that *he could not see the port side light on the "Strathalbyn" at any time when approaching, nor even when abeam*, at a distance which he estimates as from 200 to 250 feet (Apostles, p. 179). Upon being recalled a few days prior to the trial below, over two years after he had given his original testimony, he says it might have been burning, but he didn't see it. In his affidavit given a few days after the collision (Respondent's Exhibit 2), he swore, after reciting the fact of his approach to and passing of the

"Strathalbyn," "and at no time prior thereto had he been able to see any side lights on the steamship 'Strathalbyn;' after the collision, he hailed the 'Strathalbyn,' coming to her on her starboard side, when he saw a dim starboard light." On his examination before the U. S. inspectors immediately after the collision, he testified:

"Q. (Captain Whitney) Did you see his side light, sir, at all?

A. I didn't see the red light, sir, at all."

(Apostles, p. 818.)

and again:

"Q. Now, do I understand you to say that you thought she was about half a mile away when you were abeam of her?

A. Yes, sir.

* * *

Q. And even there you could not see her red light?

A. No, sir." (Apostles, p. 823.)

Crawley, quartermaster on the "Flyer," was called by appellant. He testified that after passing the "Virginian" on a converging course the lookout reported a "white light ahead," that as the "Flyer" approached the "Strathalbyn" she was spreading away from the "Strathalbyn" (Apostles, pp. 1333, 1335). This witness testified positively that as the "Flyer" approached and passed the "Strathalbyn," he *couldn't see any side light on her*. (Apostles, p. 1335.) He also testified that Captain Burns was in the pilot house as the "Flyer" passed the "Strathalbyn;" that he appeared to be kind of nervous and made a remark about the "Strath-

albyn" not having any side lights burning, and dropped the pilot house windows "kind of lively." (Apostles, pp. 1335-6.)

Ashurst, lookout on the "Flyer," testified that after the "Flyer" had passed the "Virginian," he saw a light ahead "about a mile off." (Apostles, p. 1348.) This witness was standing on the extreme forward part of his vessel with nothing to interfere with his vision.

"Q. Did you at any time prior to the collision see either her starboard green light or her port red light?

A. No sir. No I didn't see them, or else I would have reported it." (Apostles, p. 1349.)

These three witnesses were the only members of the crew of the "Flyer" who testified in this case—*not one of them was able to see either the red or green side light of the "Strathalbyn" as they approached her, nor were they able to see the "Strathalbyn's" red light even when they were abeam of her.* Cross appellant (Libellant below) called five passengers from the "Flyer," one of whom (Captain Milnor) was a retired mariner. In its brief cross appellant refers to Captain Milnor (its own witness) as "an ex-sea captain, who was getting along somewhat in years (p. 26). Whether this is said in criticism or in explanation we are unable to determine from cross appellant's brief. The record shows that Captain Milnor was "over fifty" (Apostles, p. 188), while the "Strathalbyn's" pilot and star witness, Captain Beecher, admitted 57 years of

age. (Apostles, p. 203.) We find no criticism of Captain Beecher because of his advanced years.

This witness heard the "Virginian" and "Flyer" exchange passing whistles off Pully Point. At this time he thought the "Virginian" was about $\frac{3}{4}$ of a mile off Pully Point and the "Flyer" about $\frac{3}{8}$ of a mile from the "Virginian" diverging—"we were on a divergent line from that of the 'Virginian,' divergent to the route; we were going starboard under port helm." (Apostles, p. 189.) Subsequently he heard the "Flyer" and "Strathalbyn" exchange whistles and again came on deck—at this time the "Virginian" was about $\frac{3}{8}$ of a mile on the "Flyer's" port quarter and the "Strathalbyn" one-half mile on the "Flyer's" port bow. (Apostles, p. 190.) Approaching the "Strathalbyn," he saw two white lights, one of which was low down on the water, the "Strathalbyn" was then not over one-half mile away. (Apostles, pp. 189-190.) *He did not see the "Strathalbyn's" port light either when approaching or when abeam of her.* (Apostles, pp. 190-193.) In an affidavit executed by this witness a few days after the collision (Respondent's Exhibit No. 3) he stated "when the 'Strathalbyn' was abeam of us on our port side she was distant from us about $\frac{3}{8}$ of a mile and *I observed her carefully and was unable to see any port light.*"

The other passengers from the "Flyer" called by cross appellant (libellant below) were Beaumont,

a traveling salesman, Hofstetter, a sporting goods merchant, McIntyre, a sailors' boarding house keeper and Swanson, a school boy.

Beaumont testified that the "Flyer" in passing the "Virginian" "swung out in order to pass her and gave her a wide berth." (Apostles, p. 717.) That after the "Flyer" "got down a ways" (that is towards Tacoma) and "probably four or five minutes before they whistled to each other" (Apostles, p. 717), he saw two red lights and a green light—one of the red lights directly ahead of the "Flyer" and the other red light "a ways off to the left" (Apostles, p. 718); that the red and green light "off to the left" were on the "Strathalbyn," he also saw a masthead light; that when the "Flyer" and "Strathalbyn" exchanged whistles he could only see her red and masthead light (Apostles, p. 718); that when the "Flyer" and "Strathalbyn" were practically abeam (at time "Strathalbyn" blew her first whistle to the "Virginian") he looked back and could see the "Virginian's" red and green lights (Apostles, p. 720); that the "Flyer" passed the "Strathalbyn" from $\frac{1}{2}$ to $\frac{3}{4}$ of a mile off to port "they were no ways close." On cross examination he testified that the "Flyer" passed $\frac{1}{4}$ to $\frac{1}{2}$ a mile off the "Virginian" and was from $\frac{1}{2}$ to $\frac{3}{4}$ of a mile ahead of the "Virginian" (three or four minutes in time) when he first saw the "Strathalbyn's" red, green and masthead light. (Apostles, pp. 726-727.) After "Flyer"

had passed he saw the "Strathalbyn's" stern light. (Apostles, p. 731.)

The situation which this witness describes makes his testimony as to seeing both the "Strathalbyn's" side lights an impossibility. Claimant's Exhibit Beaumont No. 1 clearly shows this. After passing the "Virginian" the "Flyer" was on a course $SExS\frac{1}{2}S$ (Resp. Ex. 1, Burns' Ap. p. 178) diverging to westward of the "Virginian's" course ($SE\frac{1}{4}S$), a divergence of approximately 9 degrees. The "Flyer" passed at least 200 yards off to starboard of the "Virginian" (Apostles, p. 1414), which distance from the "Virginian's" course would be steadily increased as the "Flyer" forged ahead of the "Virginian." The "Strathalbyn" at this time was on a course $NW\frac{1}{2}N$ so as to pass about $\frac{1}{2}$ mile off Pully Point and was practically head on to the "Virginian," as both the "Virginian's" side lights were visible to the officers of the "Strathalbyn." The "Virginian" and "Strathalbyn" being on practically opposite course and the "Flyer" being on a diverging course well to the "Virginian's" starboard, and well to the "Strathalbyn's" port, it was, of course, impossible for anyone on the "Flyer" to have seen the green light on the "Strathalbyn" or to have seen the red light on the "Virginian." Captain Burns swears positively that the "Flyer's" course of $SExS\frac{1}{2}S$ was not changed until he had the "Strathalbyn" abeam. (Apostles, pp. 177, 818.)

Captain Duffy, pilot, and McLeod, third officer of the "Virginian," swear that the "Flyer" was at all times after passing the "Virginian" well off the "Virginian's" starboard bow, in which position of course the "Virginian's" red light could not possibly have been seen by anyone aboard the "Flyer." (Apostles, p. 1158, p. 890.) Captain Burns testified that when the "Strathalbyn" was first reported she was from 2 to 2½ points off the "Flyer's" port bow, and *that at no time prior to the collision* was the "Strathalbyn" in such a position that her green light could have been seen by anyone aboard the "Flyer." (Apostles, p. 819, p. 822.)

The testimony of this witness taken over two years after the collision is entitled to no credit whatever as he testified to seeing that which it was physically impossible for anyone on the "Flyer" to have seen.

Hofstetter testified that he saw the "Strathalbyn's" red, green and masthead light when the "Flyer's" lookout reported her "and the captain of the 'Flyer' sounded her whistle." (Apostles, p. 600.) As we have shown in connection with the testimony of Beaumont, the "Flyer," "Virginian" and "Strathalbyn" were never in position after the "Flyer" passed the "Virginian" so that it would have been possible for anyone aboard the "Flyer" to have seen the

"Strathalbyn's" green light, certainly not at the time they exchanged whistles.

McIntyre was a sailors' boarding house "runner" and furnished a portion of the "Strathalbyn's" crew. His interest and bias is clearly shown in his testimony. He testified that he walked out of the "Flyer's" lighted cabin onto her deck as the "Flyer" and "Strathalbyn" exchanged whistles; that as he got outside he heard the "Strathalbyn" blow another whistle (being her first whistle to the "Virginian") at which time the "Strathalbyn" was "a little bit head and one thousand to twelve hundred feet away;" that he saw her mast-head and red side light. (Apostles, p. 121.) The testimony of the "Strathalbyn's" officers (Apostles, p. 205, p. 222), and the "Flyer's" officers (Apostles, pp. 174-5) shows that the "Strathalbyn" blew her first passing whistle to the "Virginian" when the "Flyer" was either abeam or abaft the beam of the "Strathalbyn," so if this witness saw the "Strathalbyn's" red light it must have been when it was directly abeam of the "Flyer."

Swanson was a 19-year-old school boy. He testified that he saw the "Strathalbyn's" port light and white headlight some time before the "Flyer" and "Strathalbyn" exchanged whistles (Apostles, p. 623), although he was with Beaumont and Hofstetter he does not claim to have seen the Strathalbyn's" green light at any time. To show the unreliability of this

boy's testimony we quote his answer on direct examination to this question.

"Q. Did you lose sight of the red light and the masthead light of the 'Strathalbyn' at any time before the collision?

A. *No sir, I could see them up to the time of collision*, that is the only way I could pick out the 'Strathalbyn', that is by these lights." (Apostles, p. 624.)

This witness (standing with witnesses Beaumont and Hofstetter) states positively that *the "Flyer" was not in a position so that the "Strathalbyn's" green light was visible*. (Apostles, p. 628.)

Of the witnesses from the "Flyer", neither her Captain, lookout on her bow, quartermaster on watch nor Captain Milnor, being the only witnesses of any maritime experience aboard the "Flyer" *could see the "Strathalbyn's" red or green light at any time when approaching her or when abeam of her*. The other witnesses did not testify in this case until over two years after the collision occurred—their testimony is contradictory and in certain particulars impossible. The fact that these witnesses saw the "Strathalbyn's" masthead light is only natural if it was burning at all—their vessel was off the port bow of the Strathalbyn on a diverging course, so that this light, if seen at all, would be seen moving across their vision and would be easily distinguished from any stationary lights ashore. They were standing on the deck of a small Sound steamer not over 15 feet above the water—the masthead light of the

"Strathalbyn" was 39 to 40 feet above the water so that these witnesses from the "Flyer" would necessarily be *looking up* at the light with the sky as a back ground, so that there would be no danger of mistaking it for a shore light.

(4) Captain Duffy, pilot in charge of the "Virginian", McLeod, third officer on watch, Miguel, lookout on the forecastle head and Captain Green, master of the "Virginian", all testified positively that from the time of hearing the "Strathalbyn's" first whistle they were keeping a diligent lookout, endeavoring to pick up some light, or some object ahead from which the whistle had been sounded and that they were not able either with the naked eye nor with their glasses to make out any light whatever prior to the collision. (Captain Green, Apostles, p. 836, p. 859; Miguel, p. 870, p. 878; McLeod, p. 891-2; Captain Duffy, pp. 1159-1160, p. 1179.)

The ability, experience and honesty of these witnesses has not, and could not, be questioned. It is true that cross appellant attempts to attack the testimony of Capain Duffy. This attack is utterly unfounded. Captain Duffy—this being his first appearance in court—probably did not make as smooth and polished a witness as Captain Beecher, but a careful reading of his testimony impresses one with his truthfulness which is more than can be said of the testimony of Captain Beecher and the other officers of the "Strathalbyn."

The lower court has found their testimony to be untrue in several respects.

(5) Captain Beecher, Captain Crerar and a number of the "Strathalbyn's" crew testified that her lights were burning brightly at all times. A careful reading of their testimony however, shows that this was not the fact. As stated by the lower court:

"The officers of the 'Strathalbyn' appear to have looked at the lights often during and before the signaling to the 'Virginian', while vigilance in this regard is to be expected of men experienced in navigation, there appears to have been over anxiety on this night about the lights, which tends to show that it was realized they were not satisfactory.

A circumstance occurring an hour or more before this collision when the 'Strathalbyn' near Brown's Point, met the 'Daring', probably called the attention of those on the 'Strathalbyn' to the condition of the lights. The mate on the 'Daring' who was at the wheel, testifies:

'A. Well, first I heard two whistles and then the next was I discovered a dark object ahead, and about that time the Captain stepped out from his room and asked why I didn't answer the two whistles * * * (interrupted)

Q. Did you answer the two whistles?

A. Eventually, yes sir.

Q. Did you at the time when you first heard them?

A. No sir.

Q. Why didn't you?

A. Because I didn't recognize where they came from.

* * *

Q. Could you see the vessel that gave these whistles?

A. Well, I will have to say no, under the circumstances without explaining.

Q. What was the first thing that you did see of

the vessel, and whereabouts did you see her, if you saw her?

A. Well she was pointed out and at about the same time it was apparent to me that the dark object was opening out lights and I was convinced then that it was a vessel.

Q. Did you see any lights on her?

A. I saw two.

Q. Where were they and what kind of lights?

A. They proved to be on the forward part of the vessel, white lights and about the time I answered or eventually answered the two whistles, the one light—lower light disappeared and I concluded it was a lantern over the side where they had been clearing their anchors or something of that kind.’

The failure of the ‘Daring’ to promptly answer the signal of the ‘Strathalbyn’ probably suggested to the latter’s officers a defect in her lights.”

(Opinion of Lower Court, Apostles, pp. 1418-9.)

This conclusion of the lower court is undoubtedly correct. None of the officers of the “Strathalbyn” had seen the temporary oil lights used by the “Strathalbyn” on this night prior to the time the vessel sailed from Tacoma—nor had they sighted along her stanchions to ascertain if the lights were obscured. The failure of the “Daring” to promptly answer her whistles drew the officers attention to the defective condition of the “Strathalbyn’s” lights and thereafter they were extremely diligent in watching these lights.

Captain Beecher testified:

“meeting vessels going out of Tacoma harbor, I looked at the lights myself, as is my custom on all these vessels, and they were burning brightly. We met the “Indianapolis” at Brown’s Point, and I looked at the lights again before we got to her, and they were burning brightly.

The "*Queen*" came around just after the "*Indianapolis*" as we rounded Brown's Point, my lights *were burning brightly*. At *half past six*, the lights were reported burning brightly. *I looked at them again* myself, as I take no man's word for it. At *7 o'clock* they were burning brightly, and *I looked again*, and at 7:30 they were reported, and *when I blew my whistle* at the "*Flyer*" *I looked over the side at my red light* and glanced across to the bridge and *saw the green light reflection* on the haze, and *looked up at the masthead light*, and saw that it was burning brightly, and the *same way when I blew at the 'Virginian' at each time.*" (Apostles, pp. 209-210.)

Captain Crerar, master of the "Strathalbyn" testified that he came on the bridge when he heard the "Strathalbyn" blow her first whistle to the "Virginian", that before going up to the flying or navigating bridge he walked out to the port side of the lower bridge and looked at the port light; he then went upon the navigating bridge and *ordered the first officer to go down on the lower bridge and take a look at the port light.* (Apostles, pp. 259-260.) This was at a time according to his testimony, when the vessels were on crossing courses and a collision imminent. The first officer was on watch and was familiar with the situation and his services needed in navigating his ship. This was indeed a remarkable order for the master to give his first officer at a time of imminent peril. The master had just examined this light, yet he orders his first officer not to look at this light from the navigating bridge—but to leave the navigating bridge and to go down onto the lower bridge and exam-

ine this light. It is unbelievable that the master would have given such an order if he had not *seen himself* that this port light was defective.

Purdy, the first officer, testified that when the master came upon the navigating bridge, he (Purdy) explained the situation to him and that the master "*at once asked if our red light was all right and I said I suppose so, and I went down the ladder and looked at it.*" (Apostles, p. 288.) This, it will be remembered was immediately after the master had himself examined this light according to his testimony.

Cross appellant contends that the "Strathalbyn's" masthead light, having been seen by witnesses from the "Flyer", should have been seen by the officers and lookout on the "Virginian" even if the side lights were obscured. However this does not follow. The "Flyer" is a small Sound steamer—her bridge deck being not over 20 feet above the water (Apostles, p. 1158) and her main passenger deck would not be over twelve to fourteen feet above the water. The "Strathalbyn's" masthead light was from thirty-nine to forty feet above the water. At the time the witnesses from the "Flyer" claim to have seen the "Strathalbyn's" masthead light, the "Flyer" was on a course diverging to the westward from the "Strathalbyn's" course, so that this light moving at an angle to their course, and elevated so that the witnesses would be *looking up at* it with the sky as a

background, would be readily distinguishable from any lights ashore.

The "Virginian" was approaching the "Strathalbyn" head on—her navigating bridge was forty feet above the water. (Apostles, p. 1158.) The vision of a person standing on this bridge would be at least forty-five feet above the water, so that the officers of the "Virginian" would be looking down on the "Strathalbyn's" headlight—and would have it in a direct line with oil lights in farm houses and settlements ashore at Robinson Point from which it would be impossible to distinguish it. Captain Penfield, of the "Indianapolis", testified that there were several white lights at Robinson Point which might easily be mistaken for a dim oil light. (Apostles, p. 1001.) This is corroborated by the testimony of libellant's witness Leach.

"Q. How do you explain the fact that you picked up the red light before you picked up the masthead light?

A. Why, we may have seen the masthead light, but didn't realize what it was. It is a white light and you could not tell, but we did not see it to know what it was until after we seen the red light.

Q. Could you tell there was a steamer there if you saw the masthead light?

A. No, not necessarily; there might be a light on shore, you could not tell.

Q. Was it about the same kind of a light you might see ashore?

A. Yes sir." (Apostles, p. 668.)

It is also corroborated by the testimony of Mr. Smith of the "Daring". (Apostles, p. 1297.)

Unless this light was moving across the "Virginian's" course there would be no way of distinguishing even if it had been a bright light. The testimony however conclusively proves that it was a dim oil light.

(C) CONDITION OF "STRATHALBYN'S"
LIGHTS AFTER COLLISION.

A large amount of testimony was taken as to the condition of the "Strathalbyn's" lights after the collision. This testimony is only material as showing the general condition of the "Strathalbyn's" lights. The facts that the "Strathalbyn's" lights were seen after the collision, and particularly an hour or two hours after the collision can have no bearing upon the visibility of these lights prior to the collision.

As we have already shown, it was proven by cross appellant's own witnesses that the "Strathalbyn's" stern light was out, at least twice before the collision at about 10:15. It was also shown that the "Strathalbyn's" starboard light was either out or very dim after the collision, one witness testifying that this was immediately after, and another witness that it was an hour or more after the collision, and that this light was taken out of the screen, trimmed and re-lighted, also that the masthead light was lowered immediately after the condition of the starboard light was discovered and was given more ventilation. These facts all go to prove the generally defective condition of these lights. Immediately after the collision when

the "Strathalbyn" was lying broadside to the "Virginion," the officers of the "Virginian" saw a dim red light (Apostles, p. 837). Of course, at this time they were directly abeam of this red light, so that it would be showing its full brilliancy. Following the "Strathalbyn" toward Robinson's Point, these officers saw a white light which they supposed was a mast-head light, and that this light would flare up and go down as though it did not have sufficient ventilation or was obscured. (Apostles, p. 838, p. 853.) This testimony was given before the officers of the "Strathalbyn" had admitted that they lowered this masthead light and gave it more ventilation, which directly confirms the testimony of the "Virginian's" officers.

Several witnesses from the "Flyer," upon approaching the "Strathalbyn" after the collision, saw her green light when they were about abeam, and somewhere in the neighborhood of 100 feet off. If Lundberg's testimony is correct, he had just finished trimming this green light. (Apostles, p. 163.) Some of these witnesses testified that it was a bright light, while others admit "it could have been brighter."

In the affidavit (Respondent's Exhibit 2) given by Captain Burns immediately after the collision, he stated that he hailed the "Strathalbyn" "coming to her on the starboard side," when he saw a dim starboard light, that the "Strathalbyn" carried a high deck load of lumber on her forward deck, extending out

to the ship's rail on either side, that the range lights on the "Strathalbyn" were dim. The testimony of Hofstetter and Swanson and Beaumont as to seeing the "Strathalbyn's" lights after the collision is not very clear, as will be noted by the testimony of Swanson that he saw her red light at this time (Apostles, p. 625), which, of course, was impossible as the "Flyer" was not on the "Strathalbyn's" port side.

Captain Milnor and McIntyre both testify as to seeing certain lights after the collision. Their testimony, however, is contradictory, as one of the witnesses stated that the "Flyer," upon leaving the "Strathalbyn," passed ahead of her, at which time he could see her port light. While the other witness testified that as the "Flyer" left the "Strathalbyn," she passed across her stern and forged ahead on the starboard side, the "Strathalbyn" being headed in towards Robinson Point. The testimony of these witnesses was taken over two years after the collision, and is not entitled to any weight. Several of the members of the crew of the "Strathalbyn" also testified as to seeing her lights after the collision, at which time, however, they were only from 10 to 30 feet away from the light.

After the "Strathalbyn" left Robinson's Point and proceeded on her way to Tacoma, she was met somewhere south of Robinson's Point by a launch upon which were Mr. MacQuarrie and Mr. Leach,

employees of the American Trading Company, charterers of the "Strathalbyn," and three boys in the employ of the owners of the launch. These three boys, Rich, Eoff and Cawley, testified to seeing both of the "Strathalbyn's" side lights and her masthead light at the same time. MacQuarrie and Leach, although interested parties to this litigation, were not only unable to corroborate the testimony of these launch boys, but directly contradicted their testimony by stating that as the launch approached the "Strathalbyn," it was at all times on the "Strathalbyn's" port bow, and that they were never in a position where the "Strathalbyn's" starboard light could be seen. (Apostles, pp. 643-44, p. 646, p. 668.)

The gasoline launch "Selmora" passed between the "Strathalbyn" and the "Virginian" a few minutes after the collision when these vessels were lying stationary in the water. Captain Draper, master of the "Selmora," testified that the only light he saw aboard the "Strathalbyn" was a port light, which he saw when about $\frac{1}{4}$ of a mile away, and a head light, which he saw when he was about abreast of her foremast, when he was not over 150 yards away. He testified that these lights were both very dim oil lights. (Apostles, p. 930.)

He further testified that he approached the "Strathalbyn" on a parallel course, and that both her masthead light and port and side lights should have

been visible to him two miles away if they had been proper lights and unobscured, but that he could not make out the side light until $\frac{1}{4}$ of a mile away, nor the head light until nearly abeam.

Mr. Jackson, engineer of the "Selmora," testified that he could not see any lights aboard of her until he was pretty nearly abeam, that he saw the port light about 150 to 200 yards away, that he saw the masthead light when nearly abeam, that this masthead light and the port light were both *very, very dim lights*, that he was unable to see the outline or to make out the "Strathalbyn" until about three ship's lengths away. Upon being asked as to the appearance of the side light when he saw it abeam, he answered: "No, it was not bright. It was a very, very rotten light for a side light." (Apostles, p. 1081, p. 1101.) And as to the condition of the masthead light: "It appeared to be dim and it appeared to be smutty. That is the way it appeared to me. * * * It appeared to be shut out from right in the middle. It was brighter right in the middle and then shone dimmer out on the sides. I don't think I was the full length of the side of the light. In the same way it appeared to be a little round spot right in the middle of it. That is the reason I think it was smutty, because it seemed to be a little round spot in the middle and then she would dim out both ways up and down and on both sides; it looked just like it had been smoking and got smutty." (Apostles, p. 1107.)

This was the appearance of the "Strathalbyn's" masthead light *immediately after the collision and prior to the time when the boatswain took it down, upon orders of the third mate, and gave it more ventilation.* Mr. Wick, mate of the "Indianapolis," testified that upon passing the "Strathalbyn" at 10:05, he saw a light which he took to be a masthead light. That this light was dim "in fact it looked like it was nearly out." (Apostles, p. 1009.)

(D) OBSCURATION OF "STRATHALBYN'S" SIDE LIGHTS.

The testimony of the officers and crew of the "Daring" and the testimony of Captain Penfield and Quartermaster Phillips of the "Indianapolis," to which we have heretofore referred, shows conclusively that the "Strathalbyn's" starboard light was obstructed by her cargo stanchions, so that it could not be seen from ahead.

A great deal of testimony has been taken as to the various measurements of the S. S. "Strathalbyn," with particular reference to the location of her side lights on the lower bridge, but before going into this testimony, we will review very briefly the testimony of witnesses which shows that both side lights were obscured by her cargo stanchions so that they could not be seen from ahead.

Of course it is apparent that if both of the "Strathalbyn's" side lights were visible from a point

directly ahead of said vessel, her side lights were not obstructed by her cargo stanchions. The only witnesses in this case who have testified that both side lights were seen prior to the collision were witnesses Hofstetter and Beaumont, passengers on the "Flyer." As we have shown, in connection with our discussion of the testimony of these witnesses as to seeing the "Strathalbyn's" lights in the position of the "Flyer" and "Strathalbyn's" at the time these witnesses claimed to have seen both the "Strathalbyn's" side lights, it was absolutely impossible for any person on the "Flyer" to have seen the "Strathalbyn's" green light, for the reason that the "Flyer" and "Virginian" were on divergent courses, the "Virginian" being on a course $SE\frac{1}{4}S$, which would carry her about $\frac{1}{2}$ a mile off Robinson's Point, while the "Flyer" was on a course to the westward $SExS\frac{1}{2}S$, which would carry her inside of Robinson's Point. The "Strathalbyn" was on a course $NW\frac{1}{2}N$, which would carry her about $\frac{1}{2}$ a mile off Robinson's Point. On these courses both the side lights of the "Virginian" were visible to the "Strathalbyn," showing that they were directly head on. The "Flyer" being on a divergent course to the westward, and off the "Strathalbyn's" port bow, the green light of the "Strathalbyn" could not at any time have been visible to anyone aboard the "Flyer." This is confirmed by the testimony of Burns (Apostles, p. 818) and Swanson (Apostles, p. 628). The testimony of these witnesses is therefore entitled to no

weight whatever. Several witnesses testified to having seen both the "Strathalbyn's" side lights at some time after the collision. This, however, was at least 3 to 4 hours after the collision and would not be material as showing the position or obstruction of her lights prior to the collision, as there had been ample opportunity to cure this defective condition of her lights. However, we have heretofore shown that the testimony of these witnesses, Rich, Eoff and Cawley, is contradicted and shown to have been false by cross appellant's own witnesses, Leach and MacQuarrie. Leach, an employee of the charterer of the "Strathalbyn," testified to having seen both the "Strathalbyn's" side lights at the same time, in approaching her several hours later off Brown's Point. None of the crew of the launch, however, saw both the side lights at this time. This witness testified that he took particular notice upon approaching the "Strathalbyn" this time to see if both her lights were visible, by reason of the fact that she had been in a collision. A reading of this witness' testimony, however, will show that the launch was approaching the "Strathalbyn" on the "Strathalbyn's" starboard side at all times, so that he could not possibly have seen her red light. (Apostles, p. 670.) The statement on page 41 of cross appellant's brief is significant: "A collision having occurred, the next step was to obtain evidence that the stanchions did not obstruct the lights." At this time, no question had been raised as to the obscuration of the "Strathal-

byn's" lights, so far as we know; certainly, not by the appellant in this case. The testimony of Leach shows that he paid no attention to her lights upon approaching her the first time but that after he had been aboard the "Strathalbyn," south of Robinson's Point, he was diligent upon approaching her on subsequent occasions *to see if the cargo stanchions obstructed the lights*, and that this is what he had in mind at the time of endeavoring to see both of her side lights at the same time. (Apostles, pp. 673-4-5.)

The testimony also shows that by 10 o'clock on the morning after the collision, cross appellant not only had a photographer, but that he had two or more witnesses aboard or around the "Strathalbyn" for the purpose of trying to prove that her stanchions did not obscure the light. This, however, was certainly not established by either the testimony of these witnesses or by any of the numerous photographs taken by witness Lee, the photographer. It will also be noted that at the time these witnesses inspected the vessel, and at the time the photographs were taken the lashings on the cargo had been loosened and a portion of the cargo unloaded, the effect of which was, of course, to release the strain on these port stanchions and to place the strain on her starboard stanchions, the vessel having a heavy list to starboard. (Libelant's Lee Exhibit 5.)

Capt. S. B. Gibbs, surveyor for the San Francisco Board of Marine Underwriters, an absolutely impartial and disinterested witness, and undoubtedly well known to this court, testified that he was aboard the "Strathalbyn" on several occasions in the interest of the cargo underwriters. That he was aboard when the "Strathalbyn" had practically finished reloading her cargo some three months after the collision in company with Mr. Gardner, Lloyds' agent, who was aboard the "Strathalbyn" representing the underwriters on both vessels. Captain Gibbs stated that on this occasion he made an examination of the location of the side lights of the "Strathalbyn" with reference to the location of the cargo stanchions on her forward deck, and from such examination he was satisfied that the lights were obscured from a point ahead. That the "Strathalbyn" at this time was in practically the same condition she was in at the time of the collision. In making this examination, the witness stated that he stood on the bridge and sighted from the lights forward along the line of stanchions, and that he then went on the forecastle head and sighted aft along the line of stanchions and was satisfied that the light was obscured by the line of stanchions (Apostles, pp. 1133-1139). Capt. Gibbs testified that he examined and surveyed between 75 and 100 vessels loaded with lumber per year, and that the *tendency of all deck loads of lumber on steamers is to spread the stanchions outboard, particularly if the vessel had a list,*

and that there was no way of preventing this upon a steamer (Apostles, p. 1135), and “since this accident we have paid very careful attention to the location of its lights and the range of lights to see if they were obscured by the stanchions of the deck load.” (Apostles, p. 1144.)

Capt. Fowler, Lloyds’ surveyor, was aboard the “Strathalbyn” the morning after the collision, about 9:30, at which time none of her deck cargo had been removed. On this occasion, after looking after the safety of the vessel, he examined the port side light.

“I cast my eye along from this lower light—along the stanchions, and I could see plainly that the light could not be visible forward. At that time the vessel had a heavy, heavy list a’starboard, in fact the starboard cargo on the starboard side was in the water and all of the weight of the deck cargo was on the starboard stanchion and I stood myself looking along from the lamp—I didn’t look from the forecastle head aft but I looked from the lamp, where the lamp was placed, and I satisfied myself it would be impossible to see any light ahead.” (Apostles, p. 1147.)

He further testified that at the time of his examination, this light was obscured about two degrees from straight ahead. The court will remember that this was at a time when the entire weight of the cargo was on the starboard stanchion and that this obscuration of the port light must have been materially greater at the time of the collision.

Capt. Fowler was not at the time he made this examination, acting for or in the interest of the “Vir-

ginian. He was acting solely as Lloyds' surveyor for the interest of the underwriters on the "Strathalbyn," and in afterwards assisting in drawing the specifications for the repairs of the "Virginian" he was acting in a like capacity for the underwriters on the "Virginian."

Fred A. Gardner, surveyor for Lloyds agent at San Francisco, went aboard the "Strathalbyn" at the request of Lloyds' agent and followed up her repairs at the request of the London Salvage Association. He was in no way interested in or acting for the "Virginian." His testimony corroborates the testimony of Captain Gibbs in every particular (Apostles, pp. 1213-4-5). He estimated the obscuration at from 10 to 15 degrees from straight abreast.

These were all impartial marine surveyors in no wise interested in the "Virginian" to any greater extent than they were in the "Strathalbyn." They were the only surveyors who examined the "Strathalbyn" immediately after the collision, and at that time were acting solely for the underwriters on the "Strathalbyn."

A number of the crew of the "Strathalbyn," in testifying as to the condition of these lights, inadvertently gave testimony which proved conclusively that these lights were obscured by the cargo stanchions.

John Brown, a fireman, testified that after the collision, he came up on the port side of the ship and

in walking aft inside the line of stanchions the port light was shining directly in his eyes (Apostles, p. 146). Lundberg, another fireman, testified that he saw the red light after the collision in walking aft on the deck cargo (Apostles, p. 156, p. 160-161), inside of the line of stanchions. This fact was also testified to by Jos. Sheehan, another fireman (Apostles, p. 164, p. 167) and P. Furlong, another fireman (Apostles, p. 168, p. 171). Cameron, lookout on the "Strathalbyn," testified that he could see the side lights (by standing on the poop of the windlass) showing inside the first stanchion. Cross appellant attempts to explain this testimony on pages 47 and 48 of its brief. This explanation, however is not satisfactory to us and we are certain that it will not prove satisfactory to the court. If a man standing on the fore-castle deck 9 feet off from the line of the ship's keel could see the port side light shining inside the line of stanchions eight feet ahead of the light, it seems to us perfectly apparent that this light must have been obscured by the stanchions. Certainly, if these lights were so fixed that they could be seen by this witness on the bow, practically amidships, the side lights would cross the ship's bow, which is directly contrary to regulations. Article 2 of the Inland Rules provides that the side lights shall be so constructed as to show "an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam."

Many vessels have been held at fault for having side lights so screened that they crossed her bow. If the above witness could see the red light by standing on the "Strathalbyn's" forecastle head and only 9 feet (probably less) from her center line then certainly this red light would show across her bow so that it could have been seen by a vessel approaching the "Strathalbyn" on her starboard side. We cannot believe that her light screens were so constructed. What the witness undoubtedly saw was the reflection of these lights on the inside line of the stanchions. Altogether, seven sailors and firemen on the "Strathalbyn" testified to seeing this port light shining *inside the line of stanchions*. This is corroborated by the testimony of Capt. Beecher that he observed the rays of the red light shining *full upon the first cargo stanchion forward*, and ranged along so that he could see the reflection on 3 or 4 stanchions forward. (Apostles, p. 211.)

Captain Crerar of the "Strathalbyn" testified to the same effect. (Apostles, p. 250.)

First Officer Purdy saw this light shining full on the first stanchion. It is admitted that the first stanchion forward of the light was 8 feet 3 inches forward of the superstructure, and that the distance, measured across the decks, between the inside bulbs of the main rail on the port and starboard sides at this point was between 48 feet and 7 inches and 48 feet and 7½ inches. That

these stanchions were placed every 6 to 10 feet forward up to the forecastle, inside and next to the rail, so that each stanchion forward of the first stanchion is a little inboard of this stanchion. The structure of the screen is such that the light will shine straight ahead, said screen board being parallel with the keel of the ship, so that it is perfectly apparent that if some of these witnesses could see this port light inside the first stanchion, or could see the port light shining full on the first stanchion, this is absolutely conclusive proof that this light screen was inside the line of stanchions, and that the side light was obscured by the stanchions.

On November 4, 1913, Mr. Capers, a lawyer associated with proctors for appellant, went to Port Blakely with Mr. Nowell, a photographer, for the express purpose of making photographs of the "Strathalbyn" to ascertain definitely whether or not the deck cargo stanchions placed in the usual manner when the "Strathalbyn" was carrying a deck load of lumber on her forward deck, would obscure the side lights placed in the light screens on the lower bridge. A day or two previous to this time, Mr. Andrews, Capt. Genereaux, Capt. Fowler, Capt. Logan and Mr. Walker, all marine surveyors, had made careful measurements of the Strathalbyn as she appeared at that time, and had determined definitely the location of the lamps when placed in the lower bridge screens, and the exact location of the flame of such lamps. Their survey report is in evidence as Libellant's

Exhibit Z-1. Mr. Capers was furnished with these measurements and specifically instructed to place the lens of the camera exactly where the flame of the lamp would be in said screens, and to carefully place the camera exactly parallel to the fore and aft board of the light screen. Mr. Capers followed these instructions as closely as possible, the only variation being that the lens of the camera was placed $1/6$ of an inch further outboard than the flame would be in pictures taken from what he described as "position Number 1." This, of course, is to the advantage of the "Strathalbyn" (Apostles, p. 1309). Capers Exhibit "A" was taken from the lower bridge light screen with the lens $1/6$ of an inch further out than the wick of the lamps placed in the screens would be. Exhibit "B" is taken from the same point with the lens $1/2$ inch further out than the wick of the lamp would be. Exhibits "C" and "D" are taken from the lower bridge with the lens of the camera 1-13/16 inches, being the width of the wick, further out than the point from which Exhibit "A" was taken. In this picture, the inside of the lens is placed where the extreme outside edge of the wick would be. Exhibits "E" and "F" were taken from the stanchions looking aft.

John A. Villiers, longshore boss, who loaded the "Strathalbyn" at Port Blakely, testified that when she was finished she had 10 inches more deck cargo than when these pictures were taken; that when the lashings were put on the stanchions they could not possibly bring

the stanchions inboard more than 3 inches. (Apostles, pp. 1331-2.) It is further shown by this witness that at the time these pictures were taken this deck cargo was loaded in the usual manner and stanchions were placed in the usual manner. These pictures conclusively show that when the "Strathalbyn" was carrying a deck cargo as ordinarily loaded, the stanchions would obscure the side lights on the lower bridge deck.

The testimony of Waadne (Apostles, p. 701, p. 706) who superintended the loading of the "Strathalbyn's" cargo prior to the collision, shows that she was loaded in the usual manner and without reference to the lights on the lower bridge. (Apostles, p. 705.)

Leach, supercargo of the American Trading Company, charterers of the "Strathalbyn", in connection with the loading and lashing of this deck cargo, testifying as to the method of securing the stanchions inboard stated:

"Q. Do you know whether that was done on this ship?

A. I could not state whether it was done or not; *I should know but I do not.*" (Apostles, p. 659.)

As we have stated, a great deal of the testimony has been taken as to the actual measurements of the "Strathalbyn". In view of the positive testimony as to the obscuration of these lights, however, we do not deem the discrepancy in these measurements to be material, and are willing to accept the findings of the lower

court that the light screens were 47 feet and 7 inches apart. "The lights in the screens back of the blocks were the same distance apart. The first stanchion on the port side was about 8 feet forward of the front of the lower bridge. At this point from the inside of the bulb to the top of the rail at the port side to a like point on the starboard side was 48 feet 7 or $7\frac{1}{2}$ inches, or $6\frac{1}{2}$ inches further outboard on each side than the side lights. It, therefore, follows that unless the first stanchion on the port side leaned inboard at least $6\frac{1}{2}$ to 7 inches at a point level with the lamps used, it would obstruct this light forward." (Apostles, p. 1420.) Cross appellant in its brief (p. 53) admits that the side lights were 8 inches inside the line of stanchions, if they were standing straight. The stanchions were 6x10 and 20 feet high, admittedly, at least 4 feet above the height of the side lights. The testimony of Captain Gibbs that these stanchions always leaned a little outboard and that it is impossible to correct this on steamers, and the admission of Cameron, the lookout on the "Strathalbyn", that these stanchions *stood straight* (Apostles, p. 324), and the further admissions of the longshoremen and crew of the "Strathalbyn" that these stanchions were not placed with reference to the light screens on the lower bridge deck, certainly justifies the court's conclusion that these stanchions would lean outboard slightly.

"Under these circumstances it is reasonable to conclude that the stanchions would lean outboard slightly, by the force of gravity; as the loading progressed the

tendency would be for the lumber to spread and shuffle outboard and all the effect of this would not be overcome by drawing the stanchions inboard afterward. Such a result with poles or lumber on railroad cars or cord wood upon a wagon between stanchions are matters of common observation." (Apostles, p. 1420.)

Which proves beyond any argument that the "Strathalbyn's" side lights were obstructed by her cargo stanchions so that they could not possibly be seen from ahead. Cross appellant in the latter part of its brief apparently concedes this fact and in an attempt to show that these lights should have been seen by the "Virginian" endeavors to establish that the "Virginian" and "Strathalbyn" were approaching and collided, not head on but at a considerable angle.

The angle of contact between these vessels is too clearly shown from the marks left upon the two vessels to admit of any doubt. The witnesses from the "Virginian" testified that as far as they could see from an imperfect view of the "Strathalbyn" the vessels collided head-on. The witnesses from the "Strathalbyn" testified that the vessels collided at an angle of from 2° to a right angle. From the time the "Virginian" had passed Pully Point and straightened out on her course for Robinson's Point, the vessels were on practically head-on courses. The "Strathalbyn" admits that the vessels were heading "head and head" up to within a minute or a little more prior to the collision, at which time they claimed the "Strathalbyn" swung to her starboard and the "Virginian" swung to her port. It is conclusively

proven by the testimony of the "Virginian's" officers that no orders were given to change her course from the time she passed Pully Point up to the time of the collision (Apostles, p. 1203), and by the testimony of her wheelsman, her course was not changed at any time after passing Pully Point. (Apostles, p. 902.) There was no competent testimony to the contrary. Unless both of these vessels changed their courses immediately prior to the collision, they must have struck upon the courses and at the angle upon which they were approaching, and the lower court has so found.

"The 'Strathalbyn', at the time of collision, had a six degree list to starboard. The "Virginian" had no list.

The stem of the 'Virginian' struck across the stem of the 'Strathalbyn' at the 29-foot mark. Above that point, the stem of the 'Virginian' entered the port bow of the 'Strathalbyn'. Below that point, the stem did not enter the hull of the 'Strathalbyn', but the starboard bow of the 'Virginian' moved, in contact, aft along the starboard bow of the 'Strathalbyn', the fore-foot of each vessel passing by that of the other.

The lower structure of the 'Strathalbyn' being stronger than the upper and able to fend off to starboard the 'Virginian', whose stem and bow remained rigid throughout, the stem of the 'Virginian' above the 29-foot mark, as it entered the upper part of the 'Strathalbyn', instead of following a prolongation of the line of approach and contact, was deflected through to the starboard bow of the 'Strathalbyn', along a line corresponding to that of the latter's starboard bow, below the 29-foot mark. The stem of each vessel is practically perpendicular fore and aft—that is, with no overhang forward, so that there could have been no contact with the 'Strathalbyn's' port bow above the 29-foot mark before that had with the starboard bow below." (Apostles, p.)

This is clearly shown by the photographs of the "Strathalbyn", Claimant's Exhibits "5" and "6", and Libelant's Exhibit "V-3".

This is corroborated by the testimony of all the marine surveyors who examined both vessels immediately after the collision. Fowler (Apostles, p. 1149), Gibbs (Apostles, p. 1134), Gardiner (Apostles, p. 1219), (Libelant's Exhibit "F-A-6-6"), Erissman (Apostles, pp. 1112-3), (Libelant's Exhibits "V-1"- "V-2").

The only testimony to the contrary is that of Mr. Jack, a surveyor especially employed and sent to the Coast from New York by the owners of the "Strathalbyn" to look after her repairs, and by Mr. Dickey of San Francisco. Mr. Jack arrived some time after the collision occurred, and his conclusion is based largely upon incomplete drawings, plans and pictures taken by cross-appellant, evidently for this sole purpose. The drawings were prepared by Jack at Esquimalt, B. C., for the purpose, according to his testimony, of being used in connection with her repairs. Her repairs, however, were completed about the first of March, and these plans were not drawn until the latter part of February, or at a time when the repairs were practically completed. This witness admits that if the course of the "Virginian" was deflected in any way after she came in contact with the "Strathalbyn's" bow, his calculation that the angle of contact was about $3\frac{1}{2}^{\circ}$ is incorrect, and of no value (Apostles, p. 433). The testimony shows that the "Vir-

ginian's" course was deflected from $3/4$ of a point to one point by the impact of collision (Apostles, p. 1199). According to the testimony of Fowler, Gardiner and Gibbs, the courses of the vessels were changed after they came in contact and the lower court has so found (Apostles, p. 1420). And of necessity, this must be true. It would be impossible for a vessel with a bluff bow such as the "Virginian's" to enter another vessel and keep her exact course. The bluff of her bow must either give way or fend the "Virginian" off to her port. If the course of neither vessel changed, then the "Strathalbyn's" bow would have shown the exact contour of the "Virginian's" bow. Witness Dickey had never seen either the "Strathalbyn" or the "Virginian", and had never examined the damage except as he could determine the same from certain photographs. With this incomplete data he determined that at the time of the collision the "Strathalbyn" was at rest and that the "Virginian" had a speed of 95/100 of a knot. Another surprisingly accurate estimate is that the "Strathalbyn" was rolled for a period of 20 seconds during the time of contact. However, cross-appellant's other expert, Jack, says they were not in contact more than a second or, at the outside, two (Apostles, p. 429). Photographs of the "Virginian" which Mr. Dickey used in making his deductions were taken by Mr. Gardiner, who objected to furnishing these photographs, for the sole reason that they were very poor photographs and possibly misleading (Apostles, p. 1222). That this witness's testimony is not enti-

tled to any weight seems to us perfectly clear. He testified that the distance between the lower light screens, measured across the ship, was 53 feet 7 inches. The actual measurements show this not to have been more than 47 feet 7 inches, showing an error of over 6 feet upon the only measurement from which witness could be checked.

At the time of and prior to the collision, the "Virginian" was on a course SE $\frac{1}{4}$ S, which would clear Robinson Point about one-half mile and was the usual and proper course for a large steamer on a voyage from Seattle to Tacoma. On hearing one whistle ahead, which indicated that the signaling vessel was changing her course to starboard, it is inconceivable that the "Virginian" should change her course to her port bow—if she were in a position to answer this whistle she would have answered and ported her helm so as to change her course to starboard—not being able to see the signaling vessel or her lights, certainly she would not have starboarded her helm.

There was absolutely no object in the "Virginian" making such a change and the positive testimony of her officers is that she did not make such a change, and the marks left upon the vessel conclusively show not only that she did not change her course, but that the "Strathalbyn" did not change her course, and the lower court has so found.

Cross-appellant has made no charge of incompetence against the officers of the "Virginian", nor could any such charge very well be made. They were all men of years of maritime experience, employed by the largest steamship company operating under the American flag, which owns and operates the largest and most modern freight steamers in service today. The only allegation of fault made in this connection by cross-appellant is that the failure of these officers to see any light on the "Strathalbyn" is in itself proof of a careless lookout. The positive testimony of these officers that no lights were visible in connection with the conclusive proof of the dimness and poor condition of the "Strathalbyn's" lights, together with the proof that these side lights were obscured by the cargo stanchions leads me to the irresistible conclusion that either the "Strathalbyn's" lights were not burning prior to the collision or that they were so dim that they couldn't be seen more than a hundred feet or so, and that they were obscured so that they couldn't be seen at all from ahead.

"The purpose of lights is to be seen. If they do not fulfill that office to *ordinary observation*, the vessel must be held in fault; and when several witnesses concur in testifying that the lights could not be seen in a situation when they ought to have been seen, and, more *especially when it appears that the persons in charge of another vessel maneuvered their vessel in reference to the other, and that upon looking specially for colored lights, could not see any, and actually navigated their own vessel in a way that would have been highly improbable had the colored lights been visible* * * * the inference seems irresistible, and this court has often held, that

there must have been some defect in the lights that ought to have been seen, but were not seen. *The State of Alabama*, 17 Fed. 847; *The Alaska*, 22 Fed. 548; *The Johanne Auguste*, 21 Fed. 134; *The Narragansett*, 11 Fed. 918; *The Sam Weller*, 5 Ben. 293." (Italics ours.)
The Amboy, 22 Fed. at page 556.

The language of the above case is especially applicable to the case at bar. Here it is shown that the officers and lookout of the "Virginian" were keeping an especially diligent lookout for lights; that they couldn't see any lights, and that they navigated their vessel "in a way that would have been highly improbable" had the lights been visible. The court must hold either that all of these officers and the lookout have perjured themselves or else hold that they didn't and couldn't see the "Strathalbyn's" lights. If the "Virginian's" officers had seen the "'Strathalbyn's' lights, why should they stop their vessel? Why should they reverse their vessel full 'speed astern?' " If the "Virginian" had seen the "Strathalbyn" she could have easily avoided her. Does the Court think for a second that the "Virginian" deliberately and wilfully ran into the "Strathalbyn"? Such would be the effect of a holding that the "Virginian's" officers *should* have seen the "Strathalbyn", for the testimony is positive and uncontradicted that these officers were keeping a sharp and especially careful lookout, so that if the "Strathalbyn's" lights were visible and *could have been seen*, they *must* have seen them. We do not understand libellant to seriously urge that the "Virginian's" officers did see the "Strathalbyn's" lights—it

being their contention that these lights were visible and *should* have been seen by the "Virginian". If these lights were "visible and should" have been seen by the "Virginian", then surely the "Virginian" did see them, as they were keeping a diligent lookout, and deliberately ran into the "Strathalbyn", and her officers and crew are all lying. Does the Court believe this? What was the incentive?

There are numerous cases to the same effect as "The Amboy."

"Five witnesses from the steamer ought especially to have seen any such lights ahead that were visible, and four other witnesses would naturally have observed them before collision. All say they could not see any light.
* * * It is not credible that so many persons on watch should for ten minutes not see a light ahead, if it were such a light *as the regulations require, and not obscured*. In many similar cases it has been held that where several persons on watch apparently attentive to their duties, can see no light during such a considerable period, when it ought to be seen, *the defect will be ascribed to the other vessel, even when the precise reason why the light is not seen does not appear.*"

The Monmouthshire, 44 Fed. 697, citing *The Narragansett*, 11 Fed. 918.

The Royal Arch, 22 Fed. 457.

The Alaska, 22 Fed. 548.

The Westfield, 38 Fed. 366.

The Drew, 35 Fed. 789.

"Still more, when there are circumstances such as exist in this case, viz. the lights being set far aft and low down, *and the vessel listing to starboard, that might cause the lights to be obscured. The Johanne Auguste*, 21 Fed. 134; *The Caro*, 23 Fed. 734."

The Monmouthshire, 44 Fed. 697.

This language is particularly applicable to the case at bar. In this case it is not only shown that the lights were dim lights, not visible any distance, if burning, but that *they were obscured* by cargo stanchions.

“There is nothing to indicate that the officers were not reasonably vigilant and attentive to their duties. Under such circumstances, failure to see the lights has been frequently held to be strong evidence that the light was not visible, *and this ought to be deemed sufficient, where, as in this case, there appears to have been a reasonable and sufficient cause for the obscuration of the light.*”

The Circassia, 55 Fed. 113.

In the present case there is not only “nothing to indicate that the officers were not reasonably vigilant and attentive to their duties,” but it is shown positively and conclusively that they were vigilant and attentive to their duties. It is also shown not that there was a “reasonable and sufficient cause for the obscuration of the light,” but that the lights *were actually obscured*.

To same effect as the above cases, see:

The Erastus Corning, 25 Fed. 572.

The Pierre Corneille, 133 Fed. 605.

The General, 82 Fed. 830.

In the last mentioned case, *The General*, 82 Fed. 830, Judge Brown, in summing up the evidence, says:

“Her captain and pilot testify that on the night of the collision unusual precautions were taken to discover small craft, as it was known that the yacht squadron in Newport Harbor would attract a large

number of pleasure craft, and as the northern sky was darkened by an approaching thunder storm. In addition to the lookout at the bow on the saloon deck, the captain and pilot were in the wheel house, solely engaged in keeping a careful lookout, the quartermaster being at the wheel. Of these four persons no one discovered or reported a light or saw the sloop until they all simultaneously saw the sloop's mainsail by the steamer's headlight. This direct and positive testimony from persons whose calling and interest require constant diligence, as to their conduct upon an occasion that would naturally excite diligence, is entitled to great weight, and cannot be disregarded unless absolutely inconsistent with the circumstances. That four persons should have failed to see a light, which, if visible, must have been nearly in their course for four or more minutes, is a very strong circumstance in support of the respondent's contention that the light was obscured by the jib on the yacht. * * *

Finding no reason to discredit the testimony of the witnesses for the steamer as to their actual diligence, and the obscuration of the Gypsy's light being, under the circumstances, a reasonable explanation of their failure to observe it, I am of the opinion that the libellant has failed to establish by a preponderance of evidence any fault in the steamer."

It seems to us that the above cases are conclusive upon cross appellant and that the "Strathalbyn" must be held to be grossly at fault; and under the well settled rule, admitted by both parties hereto, that when fault on the part of one vessel is clearly established, which fault is of itself, sufficient to account for the disaster, the fault of the other vessel as contributing to the disaster must be clearly and undisputably established in order to hold her also in fault, and that in such case "it is not enough for such vessel to raise a doubt with regard to the management of the other

vessel," that the "Strathalbyn" must be held *solely* at fault.

The Umbria, 166 U. S. 404, and cases cited on page 86 of appellant's brief.

NAVIGATION OF "VIRGINIAN" AND "STRATHALBYN" PRIOR TO COLLISION

We entirely agree with cross appellant's statement on page 93 of its brief that this collision was not caused by inevitable circumstances; that it was brought about through the "carelessness of either one or both of the steamers" and that to determine negligence requires an investigation of the conduct of parties before the vessels get close enough together to require *perfect judgment in extremis*. The record clearly discloses that the gross negligence of the "Strathalbyn" was alone responsible for allowing these vessels to get so close together that the "Virginian" did not have time to exercise "*perfect judgment in extremis*."

We take strenuous issue with cross appellant's deduction on pages 93, 94, 95 and 96 as to the distances these vessels were apart at the times the various whistles were given. These deductions are not only absurd in themselves but are not substantiated by any testimony in this case. Cross appellant's own witnesses—the navigating officers of the "Strathalbyn"—refute the very statements relied upon by it to work

out an impossible situation. We realize perfectly the desperate situation which is faced by cross appellant—and that in order for it to escape the charge of gross negligence in its navigation immediately prior to the collision it must work out a situation of perfect safety up to the time the “Strathalbyn” blew the danger whistle. This however is absolutely impossible under the evidence and admitted facts as disclosed by the evidence in this case, which conclusively shows that the “Virginian” and “Strathalbyn” were *in extremis at the time the “Strathalbyn” blew her first whistle to the “Virginian.”*

In working out the situation of the vessels no assistance can be obtained from the “Strathalbyn” beyond the testimony of her officers, which is undoubtedly grossly exaggerated as to the time elapsing between the various whistles—the time kept in her engine room does not correspond with the time kept on her bridge, nor does the bridge time correspond with Captain Beecher’s time. It also appears that the time kept in her bridge log was partly taken from the mate’s watch and partly from Beecher’s watch and that their watches were not the same. Cross appellant’s entire argument is based upon the assumption that when the “Flyer” and “Strathalbyn” exchanged whistles that the “Flyer” was half way from Pully Point to Robinson’s Point or eight minutes ahead of the “Virginian” and the assumption that the “Strathalbyn” blew her

first whistle to the "Virginian" "when she was from a quarter to a half mile (Apostles, p. 205) away from the 'Flyer' or say 1,000 to 2,000 feet forward of her" (p. 93). These assumptions are both incorrect and unsupported by any testimony whatever.

It is shown by the "Virginian's" testimony that the "Flyer" passed her off Pully Point at 7:53 and that the collision occurred between 7:59 and 7:59½ so that not over 6½ minutes intervened between the "Flyer's" passing of the "Virginian" and the collision—during this interval the "Flyer" had exchanged passing whistles with the "Strathalbyn," met and passed her and at the time of the collision was about one-half a mile astern of her. The distance between Pully and Robinson is 3¾ miles. At the time of the collision the "Flyer" was not half way from Pully to Robinson. This is all corroborated by the disinterested testimony of Captain Penfield of the "Indianapolis" as we will show later on in this brief. The court below found that "a few minutes after this passing of the 'Virginian' (by the 'Flyer') probably not over five minutes, the 'Strathalbyn' blew one whistle to the 'Flyer'." (Apostles, p. 1414.) The court further found that the point of collision was not over a mile and a half southerly of Pully Point. Taking the court's estimate (which we will show to be in excess of the actual time) of five minutes; at this time the "Flyer" would be (at her speed of 1,470 feet per minute)

7,350 feet south of Pully, or 1.2 miles, and would be 1,775 feet ahead of the "Virginian." The statement that the "Strathalbyn" was from $\frac{1}{4}$ to $\frac{1}{2}$ a mile "away from the 'Flyer' or say 1,000 to 2,000 feet forward of her" at the time she blew to the "Virginian" is a remarkable statement in view of the testimony of the navigating officers of the "Strathalbyn." It is true that the "Flyer" was from $\frac{1}{4}$ to $\frac{1}{2}$ a mile *away*, but not *forward* of the "Strathalbyn." Beecher, pilot, says the "Flyer" was abeam of the "Strathalbyn" at this time. (Apostles, p. 222.) Purdy, first officer, says that the "Flyer" was "on our port quarter. I had quite a look around to look at her" (Apostles, p. 288) at time first whistle was given to the "Virginian." The statement (p. 94) that the "'Strathalbyn' was 1,200 feet ahead of the 'Flyer' when she blew her first to the 'Virginian' " (Apostles, p. 121) is directly contrary to the *positive testimony* of the "Strathalbyn's" officers.

The statement on page 96 that Captain Duffy testified that the "Virginian" went three-quarters of a mile after stopping up to the time she went astern is not correct. This witness evidently was testifying as to the distance the "Virginian" would travel under a stop bell before she would lose her headway—provided her engines were not reversed. It would take the "Virginian" four minutes at full speed to cover three-quarters of a mile—with her engines stopped it

would take her at least twelve or fifteen minutes to cover this distance before she would lose forward momentum. When witness understood the question, he answered that he didn't know how far she traveled during the interval from the stop bell to the reverse bell. (Apostles, pp. 1178-9.) This interval was less than a minute. (Apostles, p. 1178.) The statement on page 97 that the "Strathalbyn" swung at Robinson's Point so that she had the "Virginian" on her starboard bow and that as the "Flyer" was on substantially the same course "the red and green lights of the 'Strathalbyn' were visible on the 'Flyer'" is another incorrect statement. The "Strathalbyn" passed Robinson Point and took her course for Pully twenty minutes before the "Flyer" and "Virginian" reached Pully, at which time the "Flyer" was nearly five miles north of Pully and therefore seven miles or more from the "Strathalbyn." The "Flyer" was well to westward of "Virginian" on a spreading course—after the "Virginian" passed Pully. "Strathalbyn" and "Virginian" were on opposite courses at this time. If vessels were ever in position stated in cross appellant's brief they were seven miles apart, at which distance of course no side lights would be visible.

The statements in cross appellant's brief as to distances and times elapsing are not only not substantiated by any evidence but is contradicted by the testimony of the "Strathalbyn's" officers. From these incorrect and

contradicted statements, cross appellant works out this impossible situation: that at time "Strathalbyn" gave her first signal to the "Virginian" the "Flyer" was from 1000 to 2000 feet ahead of "Strathalbyn", and "Virginian" was 3000 feet astern of "Flyer", therefore "Virginian" and "Strathalbyn" were two-thirds of a mile apart; that five minutes or more elapsed from this first whistle to collision, in other words that it was ten minutes or more from time "Flyer" and "Virginian" passed Pully Point to time of collision which would make the collision at 8:03. By "Virginian's" time collision occurred 7:59 and 8 o'clock. This is substantiated by the "Flyer" and "Indianapolis". As we have shown in our opening brief the witnesses testified that the collision took place from $2\frac{1}{2}$ to $3\frac{1}{2}$ minutes after the "Strathalbyn" blew her first whistle. If this is correct then the vessels at this time could not have been over 1239 feet apart. At their combined speeds of 1724 feet per minute they would have collided in less than a minute no matter what action was taken with reference to their respective engines. That it could possibly have taken these large steamers $2\frac{1}{2}$ to $3\frac{1}{2}$ minutes to cover 1239 feet is of course absurd if they were both going full speed ahead at the time the first whistle was blown.

We have shown this fact in our opening brief, but as we did not contemplate at the time of writing that brief that cross appellant would contend otherwise, we did not go into the evidence as fully as we might have

done. That our estimate of *less than two* minutes from time of the "Strathalbyn's" first whistle to the time of collision is correct, is absolutely established by the positive and impartial testimony of the navigating officers of the "Indianapolis".

The "Indianapolis" passed Robinson Point at 7:40 (Apostles, p. 980, p. 1013); "Indianapolis" overtook and passed the "Strathalbyn" at 7:45 (Apostles, p. 980, p. 1013) or five minutes later. "Indianapolis" passed the "Flyer" and "Virginian" at 7:54 just south of Pully Point (Apostles, p. 990); "Indianapolis" passed Pully Point at 7:55 (Apostles, p. 983); "Indianapolis" was making fifteen knots per hour (Apostles, p. 994). These times are absolutely accurate to within a minute. Captain Penfield had made this same run many times a day for years. He was not confused or excited and there is no reason why the time taken by him and testified to in this case should not be accurate. His time between these points would hardly vary a minute in time from day to day. That they are accurate is easily established. Passing Robinson Point at 7:40, his vessel had traveled 7600 feet (at 1520 feet per minute) or one and a quarter miles north of Robinson Point at the time she passed the "Strathalbyn" at 7:45. From 7:45 to 7:55 (the time she passed Pully Point) she would travel 15,200 feet (10 minutes at 1520 feet per minute) or two and a half miles. In other words she traveled one and a quarter plus two and a half miles, or three and three-quarters miles from

7:40 (time of passing Robinson) to 7:55 (time of passing Pully) which is the exact distance between these points. Therefore "Indianapolis" passed "Strathalbyn" at 7:45, at which time "Strathalbyn" was one and a quarter miles north of Robinson Point. At 7:55 (when "Indianapolis" passed Pully) the "Strathalbyn" was another mile further north of Robinson (10 minutes at 608 feet per minute) or two and a quarter miles north of Robinson which would make her one and a half miles south of Pully. ($3\frac{3}{4}$ miles between Robinson and Pully.) At this time "Virginian" was two minutes past Pully (having passed at 7:53) or twenty-two hundred and thirty-two feet (2232 feet) south of Pully (at 1116 feet per minute). "Flyer" was 2940 feet south of Pully at this time (at 1470 feet per minute) and was 708 feet ahead of "Virginian".

Therefore at 7:55, "Virginian" and "Strathalbyn" were 6888 feet apart ("Virginian" 2232 feet south and "Strathalbyn" 9120 feet south Pully) and "Flyer" being 708 feet ahead of "Virginian" was 6180 feet from "Strathalbyn", at 7:56 distance between "Virginian" and "Strathalbyn" would be reduced by their combined speeds for one minute (1724 feet) so they were only 5164 feet apart. "Flyer", being at this time three minutes or 1062 feet ahead of "Virginian" was only 4102 feet from the "Strathalbyn". At 7:57, the distance between the "Virginian" and "Strathalbyn" had been further reduced by 1724 feet so that they were only 3440

feet apart. The "Flyer" being four minutes ahead of the "Virginian" or 1416 feet was only 2024 feet or practically $\frac{1}{3}$ of a mile from the "Strathalbyn". It must have been at this time that the "Flyer" and "Strathalbyn" exchanged passing whistles, as both the pilot of the "Strathalbyn" (Beecher, Apostles, p. 205, p. 222) and the captain of the "Flyer" (Burns, Apostles, pp. 174-5) testified that the "Flyer" and "Strathalbyn" were from $\frac{1}{4}$ to $\frac{1}{2}$ mile apart at the time of exchanging whistles.

At 7:58 the "Flyer" would be *only 54 feet* past the "Strathalbyn's" bow, so that it must have been just prior to this time that the "Strathalbyn" gave her first whistle to the "Virginian". Both the pilot (Beecher) and mate (Purdy) of the "Strathalbyn" testified positively that the "Flyer" was either *abeam* or *abaft* their beam when they gave their first whistle to the "Virginian", Purdy testifying that the "Flyer" was on their port quarter, so that he had "quite a look around to look at her." (Apostles, p. 288.) As both the "Virginian" and "Strathalbyn" had been going full speed ahead up to this time, the distance between them had been further reduced by 1724 feet, so that at 7:58 they were only 1716 feet apart. If they had both continued full speed ahead they would have come together in *less than a minute*. However, during this interval the speed of both vessels was so checked that at time of collision they were practically stopped. That the collision occurred between

7:59 and 8 o'clock by the "Virginian's" time is absolutely established. The time elapsing from the "Strathalbyn's" first whistle to the "Virginian" and the collision was *over one minute and less than two minutes*. The "Virginian" stopped her engines at this whistle and about half a minute later reversed (Apostles, p. 1178), this was before the "Strathalbyn's" second whistle. During this half minute or so the speed of the "Virginian" would not be materially checked so that she would probably make 550 feet, the "Strathalbyn" under full speed would make 304 feet, so that during this interval they approached 854 closer together and were about 862 feet apart. "Virginian" reversed full speed at this time, and shortly thereafter the "Strathalbyn" stopped, the "Virginian" reversing for, say half a minute, would check her speed about one-half, and would make about 275 feet (in half a minute) the "Strathalbyn" stopping half a minute would make practically full speed or say 300 feet, so that in this half minute vessels had approached each other approximately 575 feet and could not have been over 287 feet apart at 7:59. The "Virginian" still reversing would certainly reduce her forward momentum 50 per cent more in the next half minute and would cover approximately 150 feet and the "Strathalbyn" having reversed about $\frac{1}{2}$ minute would reduce her original speed 50 per cent and would cover 150 feet so that vessels would be together at or prior to 7:59 $\frac{1}{2}$.

We do not mean to say that these last calculations are absolutely accurate, but the error if any is in not allowing the vessels sufficient forward motions under the conditions as testified, but what is absolutely established is that the "Strathalbyn" gave her first whistle to the "Virginian" between 7:57½ and 7:58 and that the collision occurred within 1½ to 1¾ minutes thereafter or between 7:59 and 7:59½.

That the "Indianapolis" time was the same as the "Flyer's" and "Virginian's" time is shown by the fact that the "Indianapolis" passed the "Flyer" and "Virginian" at 7:54, about one minute before she was abeam of Pully. The "Flyer" and "Virginian" having passed Pully at 7:53 would be one minute south of Pully at 7:54. (The "Flyer" being 1470 feet and "Virginian" 1116 feet south of the Point.)

The calculations as to the speed which the "Virginian" and "Strathalbyn" would make with their engines stopped, and the speed which they would make, respectively, with their engines reversed, is of course, an approximation.

This time is entirely consistent with the record as shown in the engine room log book of the "Virginian." This record, together with the testimony in connection with the manner in which the same was kept, shows that the "Virginian's" engines were stopped between 7:57 and 7:57½, the time being recorded as 7:57; that her engines were reversed between 7:57½

and 7:58, the time being recorded as 7:58. No record was made in the original engine room log as to the actual time of collision, but a record was made of the time when the "Virginian" stopped reversing immediately after the collision, which was between 7:59 and 7:59½, the time being recorded as 7:59. This is not only in entire accord with the time of stopping and reversing as above established, but is directly corroborative of that time. It shows that from the time the "Virginian's" engines were stopped until they were reversed was a half a minute or more, and that from the time her engines were reversed until the reversing was stopped after the collision was about one and one-half minutes, and that the collision occurred just prior to the time when the reversing of the engines was stopped.

It is also corroborated by the testimony from the "Indianapolis" that upon reaching Pully Point she stood off of the point for three or four minutes so that she would have these vessels in sight (Apostles, p. 1015) at the end of which time she saw the "Flyer's" red light, being after the collision, and by the further testimony of Captain Penfield that at the time of the collision he was about 2½ miles from these vessels. (Apostles, p. 990.) If the collision occurred at 7:59, the "Indianapolis" would be 4 minutes north of Pully Point, or exactly one mile. If it occurred at 7:59½, she would be slightly over a mile

north of Pully. The "Flyer" at this time would be from 6 to $6\frac{1}{2}$ minutes south of Pully Point, or approximately $1\frac{1}{2}$ miles, which would make these two vessels $2\frac{1}{2}$ miles apart at the time Penfield saw the "Flyer's" red light.

The point of collision as above established was slightly over a mile, or 1.07 miles, south of Pully Point, which directly corroborates Beecher's testimony that the collision occurred a mile south of Pully Point. (Apostles, p. 229.)

That only a short interval elapsed between the "Flyer's" whistle to the "Strathalbyn" and the "Strathalbyn's" first whistle to the "Virginian," is shown by the testimony of McIntyre, to the effect that when he heard the "Flyer's" whistle he was sitting inside of her cabin. That he immediately walked out on the port side and as he came out on the deck by the port rail the "Strathalbyn" gave her first whistle to the "Virginian." (Apostles, p. 121.) This could not have taken much over half a minute.

The error of the lower court was in placing too much credit upon the testimony of the various witnesses as to the time elapsing between the different signals. It is a well known and notorious fact that witnesses at such times of excitement invariably exaggerate periods of time elapsing between whistles or bells given. That it could not have been $3\frac{1}{2}$ minutes from the time of the first whistle to the collision

seems to us perfectly apparent. The court's estimate that the "Flyer" and "Strathalbyn" exchanged whistles not over 5 minutes after the "Flyer" had passed the "Virginian" is approximately correct, as this would make the time they exchanged whistles before 7:58, while it is shown above that this time was about 7:57. If the "Flyer" and "Strathalbyn" were a mile apart at the time of exchanging whistles, it would have taken them a little less than 3 minutes to come abeam, and, according to the court's findings, it was $3\frac{1}{2}$ minutes thereafter before the collision occurred. In other words, that it was 11 or 12 minutes after the "Flyer" passed Pully Point before the collision occurred, which would make the time of collision about 8:05. That this cannot be correct is easily determined. The "Indianapolis," having passed Pully Point, at 7:55, would at her speed be $2\frac{1}{2}$ miles north of Pully Point at 8:05. The "Flyer" having passed Pully Point at 7:53, would be 12 minutes, or at her speed, 2.9 miles south of Pully Point at 8:05, so that at the time of the collision, the "Indianapolis" and "Flyer" would have been 5.4 miles apart, at which distance, of course, it would have been impossible for Captain Penfield of the "Indianapolis" to have seen the red light of the "Flyer."

The contention in cross appellant's brief would make the "Flyer" and "Indianapolis" even farther apart.

The above calculation is also corroborated by Captain Burns' testimony that when his vessel (Flyer) was abeam of the "Strathalbyn" the "Virginian" was a quarter of a mile or more astern of the "Flyer." (Apostles, p. 174.) "Flyer" and "Strathalbyn" were abeam just before 7:58; at which time, as is shown above the "Virginian" was seventeen hundred and sixteen feet (1,716 feet) ahead of the "Strathalbyn" and necessarily that distance astern of the "Flyer," being slightly more than a quarter of a mile. It is also corroborated by Burns' testimony that when he heard the danger whistle the "Flyer" was about one-half mile astern of "Strathalbyn." (Apostles, p. 180.) The danger whistle was given not over half a minute prior to the collision or from one to one and a quarter minutes after the "Flyer" and "Strathalbyn" were abeam during which time the "Flyer" and "Strathalbyn" were separating at their combined speeds of 2,078 feet per minute, so that in a minute and a quarter the "Flyer" would be approximately 2,600 feet astern, or a little less than a half a mile.

The "Strathalbyn" passed Robinson's Point prior to the collision at 7:28 by Beecher's time. (Apostles, p. 238.) Beecher states that collision occurred about 7:55 by his time, in other words the "Strathalbyn" was twenty-seven minutes past Robinson Point at time of collision, during which time she would cover (at 608 feet per minute) exactly 2.7 miles at full speed which would place her 1.05 miles south of Pully

Point which is approximately the place of collision. "Indianapolis" passed "Strathalbyn" at 7:45 ("Indianapolis' " time) one and a quarter miles north of Robinson Point. It would take the "Strathalbyn" at her speed of 608 feet per minute, exactly $12\frac{1}{2}$ minutes to travel one and a quarter miles, so that at the time the "Indianapolis" passed her one and a quarter miles north of Robinson Point it was 7:40 $\frac{1}{2}$ by Beecher's time (having passed Robinson at 7:28). As it was 7:45 by the "Indianapolis' " time (which is the same as the "Flyer's" and "Virginian's" time) at this passing it follows that the "Strathalbyn's" time was four and a half minutes slower than the "Indianapolis' " and "Virginian's" time. Therefore if collision occurred at 7:55 by "Strathalbyn's" time, it must have occurred at about 7:59 $\frac{1}{2}$ by "Virginian's" and "Indianapolis' " time (being four and a half minutes faster than "Strathalbyn's") which directly corroborates the above calculation. This is also corroborated by Beecher's testimony that immediately after the collision, an examination was made of the "Strathalbyn's" damage—and that he made a note of this examination as follows: "Sounded pumps and made examination at eight o'clock." (Apostles, p. 285.)

Now in making its estimate that about three and a half minutes elapsed from the "Strathalbyn's" first whistle to the "Virginian" and the collision, the lower court undoubtedly took the testimony of various

witnesses that one minute elapsed between the first and second whistles, that another minute elapsed between the second and third whistles and that about another minute elapsed between the third whistle and the danger signal and that from one-half to three-quarters of a minute elapsed from the danger signal to the collision. Beecher's positive testimony is that he gave his third whistle, danger whistle and reverse signal to the engine room "simultaneously" (Apostles, p. 284), which shows that the estimate of three and a half minutes was certainly one minute in excess of the actual time, and further shows the danger of placing too much reliance upon the testimony of witnesses as to matters occurring at a moment of peril. This testimony of Beecher's also reconciles the testimony of the witnesses from the "Virginian" and the witnesses from the "Strathalbyn" as to the number of passing whistles given. The "Virginian" heard only two such whistles and the "Strathalbyn" claims to have blown three such whistles. As this third passing whistle was blown simultaneously with the danger whistles it was not distinguished by the "Virginian" as a passing whistle.

The "Strathalbyn" claims to have ported after her first whistle and again after her second whistle—the court below however, found that she had not *changed her course* at the time of the collision. This is readily understood when it is established that the

interval elapsing from the first whistle to the "Virginian" until the actual impact of collision could not have exceeded one and a half to one and three-quarters minutes. The "Strathalbyn" was heavily laden, with a six degree list to starboard—she was using new coal and was unable to keep a full head of steam in her boilers and was only making about two-thirds speed, with her heavy cargo, list to port and enormous momentum she would be unwieldy and with a small head of steam and consequent lack of power and slow speed she would be very slow in manouvering and in the short interval of time elapsing between her first whistle and the collision she in all probability did not have time to answer her helm.

From the above positive testimony of the officers of the "Indianapolis" as to her time of passing Robinson Point, as to her time of passing the "Strathalbyn," as to her time of passing the "Flyer" and "Virginian," as to her time of passing Pully Point, as to holding her course off Pully Point in order to keep these vessels in sight, as to seeing the "Flyer's" port light as she swung around immediately after the collision and as to the distance between the "Indianapolis" and the "Flyer" and "Virginian" at time of collision, which testimony is corroborated by the "Strathalbyn," "Virginian" and the "Flyer," and by all the physical facts established by the evidence in this case, the distance of the "Strathalbyn" and "Virginian" from each other

at the time the "Strathalbyn" blew her first whistle to the "Virginian" is absolutely established and the further fact that *not less than one minute nor more than two minutes elapsed between this first whistle and the collision is also established beyond any argument.*

That two vessels of the size, weight, speed and momentum of the "Virginian" and "Strathalbyn" were *in extremis* at the time this first whistle was blown is apparent.

If the "Strathalbyn" had reversed at the time of, or immediately after giving her first whistle and had then given a danger whistle this collision would probably have been avoided, as under Rule 1 of the Pilot Rules require that both vessels shall be immediately reversed under such circumstances. We have shown in our main brief that even accepting the court's finding as correct, that three and a half minutes elapsed between the "Strathalbyn's" first whistle and the collision, that the "Strathalbyn" was grossly at fault in her navigation. As these vessels were much closer together than found by the lower court at the time this first whistle was given the fault of the "Strathalbyn" was even more flagrant.

She was grossly at fault for allowing these vessels to come so close together that a collision was inevitable, before giving the "Virginian" any warning. Her primary fault was the defective and obstructed

condition of her signal lights, which was the direct cause of the collision.

The collision might have been avoided by the "Strathalbyn" despite this flagrant initial fault if she had given the "Virginian" timely passing signals, and had navigated in accordance therewith by changing her helm and had given the "Virginian" timely warning of the developing danger which was perfectly apparent to her. If the "Virginian" was crossing her course as she claims this fact could have been discovered by watching the bearing of the "Virginian's" range lights long before her red light shut out. The "Strathalbyn" however, waited until the vessels were *in extremis* and a collision unavoidable before taking any precautions herself or giving the "Virginian" any warning of the impending collision.

It is established by the great preponderance of the evidence that the "Strathalbyn" was grossly in fault in the several particulars, as follows: 1st, she was at fault for having insufficient and defective oil signal lights; 2nd, she was at fault for so placing her side lights that the same were obstructed by her cargo stanchions so that they could not be seen from ahead; 3d, she was at fault for not carrying a range light; 4th, she was at fault in not giving the "Virginian" timely passing signals; 5th, she was at fault for not navigating in accordance with the passing signals which she did give, by changing her helm to port, so as to change her course

to starboard; 6th, she was at fault in failing to give the "Virginian" a timely warning of the developing danger of the collision which was apparent to her; and 7th, she was at fault for allowing the two vessels to come to a position of *extremis* so that a collision was inevitable, without herself taking any precautions or giving the "Virginian" any warning of the dangerous situation.

Any one of these faults is sufficient in itself to account for this collision and they were so flagrant and numerous that this court should not be particularly astute in an endeavor to discover some contributing fault on the part of the "Virginian", committed at a time when unerrable judgment could not be expected.

The Persian, 224 Fed. 441.

The Victory, 168 U. S. 410.

The Umbria, 166 U. S. 404.

The Thielbek, 218 Fed. 251,

and cases cited on page 86 of appellant's main brief.

The only faults alleged against the "Virginian" in cross-appellant's brief are, first, insufficient lookout; second, her failure to reverse sooner, and third, her failure to give a danger signal. There is absolutely no evidence in this case to sustain a charge of an insufficient lookout aboard the "Virginian." On the other hand, the testimony conclusively shows that she was keeping a specially careful and diligent lookout at all times prior to the collision. The testimony shows that Captain Duffy, the pilot, and John D. McLeod, third officer, were on the

"Virginian's" bridge at all times from the time of leaving Seattle until after the collision; that Joe Miguel was properly stationed in the extreme forward part of the "Virginian" as lookout; that John Shuri, quartermaster, was at the wheel, and that Captain Green, who had gone below at the time the "Flyer" passed the "Virginian" off Pully Point, came on deck at the time the "Strathalbyn" gave her first whistle to the "Virginian," and was on deck from that time to the time of the collision. It further shows that upon the "Strathalbyn" and "Flyer" exchanging passing whistles, these officers and the lookout were on the alert and endeavored with both the naked eye and by the use of night glasses to see what vessel had whistled to the "Flyer;" that they were keeping a diligent lookout up to the time of the "Strathalbyn's" whistle to the "Virginian," at which time the "Virginian's" engines were stopped; that they continued to search the waters for sight of the vessel or her lights which had been whistling, and not being able to make out any lights or the vessel itself, they immediately reversed full speed astern and were so reversing up to the time of the collision; and that not a single one of these officers or the lookout on the "Virginian," either with the naked eye, or by use of the night glasses, was able to make out any lights whatever on the "Strathalbyn" or the loom of the vessel itself until after the collision, at which time they saw a dim red light as the "Strathalbyn" swung around broad side. A careful reading of

this testimony will show that these officers and men were all competent and that they were keeping an especially careful and diligent lookout. However, the absence of any lookout could not be held a contributing fault in this case, as it is conclusively shown that the "Strathalbyn's" lights were so dim that they could not be seen over 200 feet away, even when abeam, and that upon approaching the "Virginian" head on prior to the collision, her side lights were obstructed so that they could not be seen at all. These facts were all found by the lower court. The masthead light of the "Strathlbyn," if burning at all, was a dim oil light and was so positioned that it could not possibly have been distinguished upon approaching it head on from the numerous lights ashore. The lower court found that "as the vessels were approaching head on, the masthead light would appear stationary, and under the circumstances a failure to distinguish it from shore lights upon Vashon Island will not be held at fault" (Apostles, p. 1428), distinguishing the present case from the case of *The Oregon*, 158 U. S. 186, where a government light was confused with the masthead light.

The other faults alleged against the "Virginian" have been fully discussed in appellant's main brief, and in any event, any fault committed by the "Virginian" after she had heard the "Strathalbyn's" first whistle, and certainly, after the "Strathalbyn's" second whistle had been blown, was a fault committed *in extremis*, for which the vessel cannot be held liable. However, we

confidently assert that the "Virginian" took every precaution which could humanly be expected of her under the circumstances, as disclosed by the evidence in this case.

Cross-appellant and libellant below, in an endeavor to fix some fault on the "Virginian" in its cross-examination of Captain Duffy, attempted to show that the "Virginian" was in doubt as to the "Strathalbyn's" course and intention within the meaning of the danger signal rule. However, it is perfectly apparent from this witness's testimony (Apostles, p. 1202), that the only doubt in his mind was that induced by ignorance of the position of the "Strathalbyn." He knew her course from her passing whistles and he knew her intention from her said whistles. He did not know her exact position (except that she was somewhere ahead approaching him), as he was unable to make out any lights aboard the "Strathalbyn." We have discussed this matter fully in our main brief, and will not take up the time of the court by the repetition of such a discussion here.

The cross-appellant (page 110 of its brief) contends that nothing would have been accomplished by the "Strathalbyn" blowing her danger signal, and in order to sustain this contention it admits that the "Virginian" reversed prior to the time of hearing the "Strathalbyn's" second whistle. Even under these circumstances, the collision would have been avoided if the "Strathalbyn" had given the danger whistle at the proper time and

had reversed her engines full speed astern at the same time in accordance with the requirements of Rule 1 of the Pilot Rules. On the other hand, if the finding of the court below could possibly be sustained, that the "Virginian" did not reverse prior to this second whistle, then the blowing of the danger whistle by the "Strathalbyn" would necessarily have resulted in both vessels immediately reversing and if given in sufficient time would have prevented this collision. Cross-appellant's whole argument upon this point is based upon the erroneous theory that the vessels were from three quarters to a mile apart at the time of the "Strathalbyn's" first whistle. However, it is conclusively shown that they were only slightly over a quarter of a mile apart at this time, which fixes gross fault upon the "Strathlbyn" in her navigation prior to the collision. The statement on page 115 of cross-appellant's brief, that the rules require three whistles to be blown when a vessel's engines are reversed, whether the approaching vessel is in sight or not, is an incorrect statement of the rule, as is shown in our main brief. The statement on page 116, that the "Virginian," upon hearing one whistle from ahead, knew that she was expected to port her helm and that her failure so to do is a fault, is clearly contrary to the Inland Rules. The "Virginian" knew that a vessel was approaching her from ahead, but not being able to see this vessel's signal lights or the loom of the vessel herself, she was not permitted, under the rules, to answer

this whistle, and certainly, if she was not permitted to answer she was not permitted to change her course without answering. The lower court has so found (Apostles, p. 1434).

The "Virginian" had a right to assume that the "Strathalbyn," upon exchanging whistles with the "Flyer," would port her helm in accordance with her whistles. The "Strathalbyn" admits that she did not port her helm at this time. The "Virginian" had a right to further assume that the "Strathalbyn," upon blowing a single blast of her whistle, would port her helm sufficiently to clear the "Virginian" if the vessels were approaching head on, as it was apparent to the "Virginian" that the "Strathalbyn" knew the "Virginian's" position and course and by her repeated single blasts she assured the "Virginian" that she was porting her helm for the purpose of clearing the "Virginian." In such a situation the "Virginian" was not permitted to alter her course but was absolutely prohibited from so doing. She was in a sense a burdened vessel and it was her duty not to embarrass the navigation of the "Strathalbyn," which she might very well have done by changing her course without indicating such change to the "Strathalbyn."

As is shown in the protocols of the proceedings of the Washington Conference, quoted in our main brief, such a change might have had the effect of bringing about the danger of collision instead of avoiding it. The

“Virginian” was not permitted to either answer the “Strathalbyn’s” passing signal or to change her course unless she had the “Strathalbyn” in sight, and by so answering she would have indicated to the “Strathalbyn” that she did have her in sight and considered the signal a proper passing signal, which information, of course, would have been misleading, as the “Virginian” had no such knowledge of the “Strathalbyn’s” position. Her silence indicated that she could not see the “Strathalbyn” and under the circumstances she did all that she could possibly have done by stopping her engines and shortly thereafter reversing the same, so as to check her headway and give her more time within which to see the approaching vessel. Under the rule as laid down in *The Umbria*, 166 U. S. 404, and *The Victory*, 168 U. S. 410, it cannot be said that any contributing fault has been established on the part of the “Virginian” by any clear and convincing evidence; but on the other hand, it is established that there cannot be even any doubt but that the “Virginian” was free and clear of any contributing fault, and under the rule as laid down in these cases, the “Strathalbyn” must be held solely at fault for this collision.

Respectfully submitted,

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN,
Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation,
Appellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN,
Appellant and Cross-Appellee,
vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation, as bailee of a cargo of lumber
consisting of 3,563,011 feet, and for the use
and benefit of the owners and insurers of said
cargo,
Appellee and Cross-Appellee,

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation,
Appellee and Cross-Appellant.

In Admiralty
No. 2728.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

Reply Brief of Appellee and Cross-Appellant

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Appellant's argument commences with an effort to determine the position of the Flyer, Strathalbyn and Virginian with reference to each other at the time the passing whistles were given. As a prelim-

inary to our answer to the argument upon that point and the argument in support of other phases of the case, we call attention to the fact that McLeod and Duffy (of the *Virginian*) testify they heard but two whistles from the *Strathalbyn* to the *Virginian*. The court found that the *Strathalbyn* blew three passing whistles to the *Virginian*. Some of the *Virginian's* criticism of the *Strathalbyn's* navigation will lose its weight if the *Virginian* did not hear or has forgotten the *Strathalbyn's* first whistle to the *Virginian*, and some of the inconsistencies in the assertions made in the *Virginian's* brief may be excused if the *Virginian* did not hear the *Strathalbyn's* first whistle to her, which, according to the *Strathalbyn's* testimony, was blown to the *Virginian* when she was a mile or more away.

In the course of the argument concerning the relative positions of the vessels, which argument is made from pages 20 to 32 in the brief, appellant seems to reach so many different conclusions that we are compelled to attribute this uncertainty to an attempt to reconcile conflicting, impossible and irreconcilable evidence, and to an entire disregard of evidence which shows the position of the *Strathalbyn* with relation to the *Flyer* when the *Strathalbyn* first whistled to the *Virginian*, and to an entire disregard of the probability that the *Flyer* passed the *Virginian* to the north of Pully Point, and to an

entire disregard of the place of the collision, and to a desire to make the distance as short as possible.

Appellant's calculations assume the Virginian was overtaken and passed by the Flyer abreast of Pully Point, and makes no allowance for the probability that the Flyer passed the Virginian north of Pully Point, although, on page 20 of appellant's brief, the following appears:

"The testimony shows the Flyer passed the Virginian *off of or slightly north of* Pully Point."

For appellant to reach the conclusions it arrives at in its brief (pages 20 and 26), it has to assume that the Flyer was abeam of the Strathalbyn when the Strathalbyn blew the first time to the Virginian. Appellant (brief, 20) says it is *admitted* that "as the Flyer and Strathalbyn were passing *abeam*, the Strathalbyn blew her first whistle to the Virginian." Duty compels us to say this statement is without any foundation in fact. As a matter of fact the Strathalbyn was considerably ahead of the Flyer when she blew the first time to the Virginian (Beecher says shortly after blew to Virginian, Flyer abeam—Ap. 206; Milnor says Strathalbyn half a mile on Flyer's port bow—Ap. 192-193; Beaumont says Strathalbyn one quarter mile ahead of Flyer—Ap. 731. The same inference must be drawn from Hoffstetter—Ap. 606, when taken in connection with Ap. 593 and 594, and

from McIntyre—Ap. 125, for McIntyre came out on the Flyer's deck after the Flyer had blown to the Strathalbyn and he did not hear the Strathalbyn initiate the whistles with the Flyer).

Notwithstanding the above testimony, there occurs, on page 24 of appellant's brief, the following:

“That the Strathalbyn blew her first passing whistle to the Virginian when the Flyer was abeam or just abaft the beam of the Strathalbyn,”

and substantially the same on page 42. This is a sample of an assertion by appellant that occurs time after time in the brief, and we consider it of sufficient importance to specially call the court's attention to the fact that it is, in our opinion, a reckless and unfounded assertion.

As Beecher had ported the Strathalbyn's helm and swung, the Flyer would appear to Beecher to be more nearly abeam of the Strathalbyn than if she had not ported. The Flyer's eyewitnesses were, therefore, the best judges of the Strathalbyn's position with respect to the Flyer, and they all, directly or inferentially, say the Strathalbyn was ahead of the Flyer a considerable distance when she first blew to the Virginian.

That the Strathalbyn could not have been abeam of the Flyer is almost a demonstrated fact, irrespective of the eyewitness testimony, if we consider

Mr. Duffy's evidence. Duffy testifies that one minute after he heard the first whistle from the Strathalbyn to the Flyer, he heard a whistle from the Strathalbyn to the Virginian (appellant's brief, 23). If the Flyer was 300 feet ahead of the Strathalbyn when the Strathalbyn whistled to the Flyer and the period of time between the Strathalbyn's whistle to the Flyer and the Strathalbyn's whistle to the Virginian was one minute, the Flyer would be 654 feet ahead of the Virginian when the Strathalbyn was abeam of the Flyer. Under such circumstances, there would only be 654 feet between the Strathalbyn and the Virginian at the time the Strathalbyn first whistled to the Virginian. If appellant is right in assuming that the Strathalbyn was abeam of the Flyer when the Strathalbyn first whistled to the Virginian, the Virginian would have collided with the Strathalbyn in $\frac{654}{1724}$ ths of a minute after the Strathalbyn first whistled to the Virginian (654 being the distance between the Virginian and Flyer-Strathalbyn, and 1724 being the combined speed of the Strathalbyn and Virginian).

Capt. Green, of the Virginian, heard no passing whistles from the Strathalbyn to the Virginian after he reached the Virginian's bridge. As Green heard no passing whistles from the Strathalbyn to the Virginian, the Strathalbyn must have blown three passing whistles before Green got on the bridge, if Green heard what was blown. According

to the Virginian's testimony, Green came on the bridge immediately after the Strathalbyn had blown its first whistle to the Virginian (two passing whistles must have been blown from the Strathalbyn after Green left his cabin and started for the bridge); the Virginian's engines were stopped and reversed; at least one passing whistle was blown by the Strathalbyn and heard by Duffy; the Strathalbyn blew four danger whistles; the Virginian blew three danger whistles; all of the above (in accordance with the testimony of the Virginian) occurred within this space of 654-1724ths of a minute, if Duffy is telling the truth. This absurdity does not develop if the eyewitnesses from the Flyer are believed and their testimony enters into the calculations.

In furtherance of the purpose of appellant above indicated, it also assumes that the Flyer was less than a fifth of a mile ahead of the Virginian when the Strathalbyn passed the Flyer (Page 26 appellant's brief). This is directly contrary to the testimony of Capt. Burns quoted on page 26 of appellant's brief as follows:

"The Flyer was probably a quarter of a mile or *more* from the Virginian when we passed the Strathalbyn."

and the statement that the Flyer was less than a fifth of a mile ahead of the Virginian when the

Strathalbyn passed the Flyer is directly contrary to every eyewitness who testifies on the subject.

Appellant has insisted throughout its brief that facts are demonstrated by the evidence, when, in our humble judgment, there is no merit in the assertion. By such processes, it may be hoped to gain some advantage.

The inconsistencies to which we have above referred and are about to point out are developed by the appellant in an attempt to position the Strathalbyn and Virginian prior to the collision to its satisfaction and regardless of the evidence. The purpose of this attempt is to minimize the distance between the Strathalbyn and Virginian when the whistles commenced, in order to demonstrate that the vessels were so close together when the Strathalbyn first blew to the Virginian that the collision was imminent and the Virginian *in extremis*, and that the Strathalbyn's only whistle should have been the danger whistle and her only engine movement a stop and reverse after her first whistle to the Virginian or surely not later than her second. In order to bring this situation about, it becomes necessary for appellant to distort or repudiate the testimony of its own and other witnesses in the case. If we are mistaken in the last assertion, it is because of our inability to understand the statements of appellant in its brief. They appear inconsistent to us and contrary to the evidence, and we

now ask the court to note some of the peculiarities of the argument.

On page 23 of appellant's brief, appellant refers to the testimony of the Virginian's bridge officer, McLeod, in connection with the time elapsing between the first whistle and the collision. This statement is as follows:

"That about a minute passed between the Strathalbyn's first and second whistles and about two minutes elapsed between the second whistle and the collision."

This makes three minutes between the first whistle from the Strathalbyn heard by McLeod which he interpreted to be for the Virginian. On page 23 of appellant's brief, reference is made to the testimony of Pilot Duffy, where it is said, that between the Strathalbyn's first whistle to the Virginian and the Strathalbyn's second whistle a minute elapsed, and that from one and one-half to two minutes elapsed between the second whistle and the danger signal, and from one-half to one minute elapsed from the danger signal to the collision. The result of this testimony of Duffy and McLeod is that *three* or *four* minutes elapsed between the first whistle they heard from the Strathalbyn to the Virginian and the collision. Green, the master of the Virginian, says he was on the bridge two minutes before the danger whistles, and that he came from his room when he heard the telegraph to stop. The conclu-

sion to be drawn from Green's testimony is that three minutes or more elapsed between the Strathalbyn's whistling to the Virginian and the collision. Observe what appears to us an inconsistency and refutation by the appellant of the testimony of its own witnesses. See page 31 of appellant's brief:

"it becomes apparent that it could not have taken these vessels over two minutes to come together after the 'Strathalbyn's' first whistle was blown."

Bearing in mind that Duffy, McLeod and Green make the time between the first whistle to the Virginian and the collision three or four minutes, and bearing in mind that appellant has concluded the vessels came together in less than two minutes after the first whistle to the Virginian, as just above stated, appellant further confuses us by the following, occurring on page 25 of its brief:

"The collision occurred from 3 to 3½ minutes after the 'Strathalbyn' blew her first whistle to the 'Virginian.' "

If we are not mistaken, within six pages of counsel's brief, he twice contradicts his own witnesses. But this is not all, for, under the topic "The Virginian was not guilty of any contributing fault," on p. 105 of brief, appellant says:

"If, as we believe is clearly demonstrated, this time" (between Strathalbyn's first whistle to Virginian and collision) "was only two min-

utes, then the Virginian had been reversing two-thirds of this time."

The testimony of the Virginian's witnesses concerning distances is hopelessly irreconcilable with every fixed fact in the case, unless eyewitness testimony is again to be disregarded. Please note that, on page 23, appellant quotes Duffy as saying the Flyer was from 300 to 400 feet from the Virginian when he heard a whistle ahead which was answered by the Flyer, and that, about a minute thereafter, he heard the Strathalbyn whistling to the Virginian. Note, on page 22 of appellant's brief, that it is said Capt. Green, master of the Virginian, testified that when he got on the bridge the Flyer was about a thousand feet ahead of the Virginian, and this was immediately after the Strathalbyn's first whistle to the Virginian. Note, on page 28 of appellant's brief, that the net result of appellant's effort to reconcile the testimony of the Virginian's witnesses as to the distance the Flyer was ahead of the Virginian when the Strathalbyn first blew is the conclusion that the Flyer was ahead of the Virginian from 885 to 1239 feet. Note that after these laborious calculations, on page 29 of appellant's brief it throws them all to the wind and says:

"It is our opinion that these vessels were farther apart than 1,239 feet at the time this first whistle was given."

Note that this remark is the ultimate conclusion of

appellant, after devoting pages 25 to 29 to a discussion of the testimony of the Virginian's witnesses on the point, and is a second repudiation by the appellant of the testimony of the Virginian's witnesses, the first repudiation being in connection with the time between the whistles and the second being in connection with the distance between the vessels at the time of the whistles.

We are not surprised that appellant finds it difficult, and, in fact, impossible, from the premise assumed, to do otherwise than repudiate its own witnesses. The testimony of Pilot Duffy that the Virginian was but 300 feet ahead of the Flyer when the Flyer's whistles were exchanged with the Strathalbyn places the Virginian but 1116 feet beyond Pully Point at this time, if the Virginian and Flyer passed each other abreast of Pully Point, for, at the speed given, the Flyer was making 354 feet a minute greater distance than the Virginian. The testimony shows that the collision took place in the neighborhood of a mile or more south of Pully Point.

On page 1166 of the Apostles on direct examination Duffy was asked and answered as follows:

“Q. About where did the collision occur, Captain?

A. It must have been a mile or a mile and a-half—between a mile and a-half and two miles southward of Pully Point.”

If this statement is correct it entirely destroys Duffy's estimate of the distance the Flyer was ahead of the Virginian when the above mentioned whistles were blown, and likewise shows that the time occupied by the Virginian in going from Pully Point to the place of the collision (asserted by appellant to be $6\frac{1}{2}$ minutes,) is too short, for at the Virginian's rate of speed of 1116 feet a minute she would have taken more than eight minutes and nearly eleven minutes to reach a point "one and a-half to two miles southward of Pully Point."

In cross-appellant's brief, we pointed out the difficulty of arriving at any understanding of the situation from Duffy's testimony, and the above illustrates again his entire unreliability, and appellant itself tacitly admits this by laying no stress whatever on Duffy's testimony in trying to fix the position of the vessels at the time of the collision.

Please note the remark above referred to, on page 29 of appellant's brief, which was as follows:

"It is our opinion that these vessels were farther apart than 1,239 feet at the time this first whistle was given."

and compare that remark with the remark of appellant made on page 26 of its brief, which is as follows:

"It is, therefore, fairly accurately determined that, at the time the 'Strathalbyn' blew her first passing whistle to the 'Virginian,' the

‘Flyer’ was from 885 to 1239 feet ahead of the ‘Virginian,’ and that this was the approximate distance between the ‘Strathalbyn’ and the ‘Virginian.’ ”

But the suggestion is made in appellant’s brief that the extreme distance suggested by him of 1239 feet is improbable, for, quoting from page 28 of appellant’s brief:

“If they” (the Strathalbyn and Virginian) had not been any greater distance apart they would have come together in approximately one minute after this first whistle was blown. It does not seem possible that the ‘Strathalbyn’ blew two and possibly three signals and gave the danger signal, all within a period of one minute.”

If the engine room log of the Strathalbyn is worth anything as evidence (and we can conceive of no reason why it should not be taken as absolutely the best evidence on the question of time), then there were four minutes elapsing between the signal to stop given to the engines of the Strathalbyn and the collision.

Above we have indicated that the Virginian’s witnesses show the Flyer to be but one minute (300 feet) ahead when the Strathalbyn first blew and the Flyer answered, and, again, a thousand feet (when Capt. Green reached the bridge) ahead of the Virginian, yet, on page 30 of appellant’s brief, appellant says:

“In other words, that at the time the ‘Strathalbyn’ blew her first whistle to the ‘Virginian,’ the ‘Flyer’ was from 4 to 4½ minutes ahead of the ‘Virginian,’ or from 1,400 to 1,600 feet.”

On the same page, a little farther down, appellant says that the time was “at least two minutes” from the time the Strathalbyn whistled to the Flyer until the Strathalbyn was abeam of the Flyer. Under this calculation, in the two minutes, multiplied by the Strathalbyn’s and Flyer’s combined speed, the Strathalbyn would be 4,160 feet ahead of the Flyer, which, added to the 1,600 feet that the Flyer was ahead of the Virginian, would place the Strathalbyn 5,760 feet away from the Virginian, or about a mile from the Virginian when the Virginian heard the Strathalbyn first blow to the Flyer. This distance is approximately nearer the truth as shown by the testimony of the Strathalbyn’s witnesses and of Capt. Burns of the Flyer. Burns says that when this whistle was given, the Virginian was a quarter of a mile or more astern of the Flyer. We think the distance is yet too short, for the point of the collision is pretty well agreed upon as being between a third and a half of the distance from Pully Point towards Robinson Point, and it would take the Virginian, at full speed, at least 6½ to 9 minutes to run this distance. When the Strathalbyn first whistled to the Flyer, the distance was considerably greater between the Flyer and the Virginian than suggested by appellant, and the

time run by the Virginian beyond Pully Point was considerably more than $4\frac{1}{2}$ minutes when the Strathalbyn blew to the Flyer.

As a further reply to the speculations of appellant as to the distances and positions of the steamers and the time the whistles were blown, we wish to refer to cross-appellant's opening brief, from page 93 to 96, where we have honestly tried to give due consideration to all the testimony and have understated the distance rather than overdrawn it, and we submit with confidence that this court will reach substantially the same conclusion on these points that we have.

Referring to claim of negligent navigation on the part of the Strathalbyn. Appellant has placed the Strathalbyn abeam of the Flyer when the Strathalbyn first commenced to whistle to the Virginian all through the argument on this point, when, as a fact, the Strathalbyn was nearer abeam of the Flyer on the second whistle to the Virginian than on her first. The Strathalbyn was just off the Flyer's quarter on her second whistle to the Virginian. As the Flyer and Virginian were substantially 3000 feet apart at this time, then the Strathalbyn and Virginian were very little closer. Can it be negligent for a navigator to blow a passing whistle to an oncoming vessel, when the *approaching* vessel is heading for the one giving the whistle and

the distance between them is practically half a mile? Surely not. Rule III specifies passing whistles shall be given when vessels are within one-half mile of each other (App.'s brief, 127). It can never be negligent to indicate a desire to pass as long as there is sufficient room for both vessels to pass by promptly co-operating in their endeavor. Rule I of Art. 18 of the Inland Rules requires *each* vessel, of two meeting end on, to pass on the port side of the other; and Art. 18 of the International Rules, which are applicable to all vessels navigating waters connecting with the ocean, provides that "each vessel shall alter her course to starboard so that each may pass on the port side of the other." This demands co-operation. Each navigator has a right to expect the other to do the usual and required thing, until the vessels get close enough together to indicate an abandonment of an intention on the part of the approaching vessel to do the usual and proper thing. So long as the vessels are far enough apart for the approaching vessel to execute the proper and usual maneuver and pass the vessel she is approaching in safety, there cannot be said to be a condition of danger which prohibits the use of the passing signal, and requires the use of a danger signal. The cases cited in the opening brief so interpret the rule, and distances given in that brief seemed to be sufficient to the pilot of the *Strathalbyn* to justify the three passing whistles, and we feel confident the court will agree, for, had

the Virginian then co-operated, the collision never would have occurred. Then (on the third whistle) the Strathalbyn was merely drifting, without steerage way, and the whole distance of a quarter of a mile was the Virginian's to maneuver in, and, when this maneuver was not made, the danger was blown.

What more could be expected of an ordinary mortal than to tell and tell and tell the Virginian to starboard by signaling and signaling and signaling, when such a maneuver meant perfect safety? Was it wrong for the Strathalbyn, which had lost its steerage way, to call for this co-operation until it appeared so doing would not avail? This is a question the court has to decide, and the opinion of the pilot may be of little consequence, but we submit the Strathalbyn's navigation has had the approval of very good courts, as will appear from the cases referred to.

We have asked ourselves time and again: "Would sounding the danger from the Strathalbyn when the third was blown have been a more effective way to avoid the collision than the whistling, whistling and whistling to go to starboard?" We have always had to answer it: "No."

If the Virginian was capable of forming any correct conclusion from steamboat whistles at the time these were given, she could only have known that

someone was off ahead of her who required her to go to port, for that someone never would have kept up such a whistling if he did not desire co-operation. If, knowing that someone desired such co-operation, and the *Virginian* would not render it, it does not seem probable she would have co-operated in the way demanded by the danger signal. As but one simple maneuver was required by the *Virginian* to change her course to keep her away from the *Strathalbyn*, prudence dictated the continued giving of the whistle which demanded this maneuver until it became apparent it was useless.

The *Virginian* takes the position that the *Strathalbyn* had the sole duty of avoiding the collision because "The *Virginian's* failure or refusal to answer the whistles could indicate only one thing to a competent navigator; that is, that the *Virginian* could not see the *Strathalbyn* or any of her lights" (brief, 45).

This phrase, in the exact language above quoted or in words of exact import, is repeated and repeated time and time again by appellant as though it hoped by so doing to force the pen that writes the decision in this case to mimic the phrase. From page 126 to 136, with much single-spaced print, appellant labors to show that the *Virginian* was prohibited by the rules and regulations from expressing her doubt of the *Strathalbyn's* position, course and intention by blowing the danger signal.

Not a single case is cited in these 10 pages in which any court has interpreted the rules, under anything like the circumstances prevailing in this case, in accordance with appellant's contention.

Rule III requires the danger signal to be *immediately* given when, "*from any cause,*" the course or intention of a vessel is not understood. Strike out the words "*from any cause*" and insert words into the rule which limit the cases where the signal is to be used to causes which arise only when the vessels are in sight of each other, and then the court will have legislated as appellant desires.

In the interpretation of all laws, the first rule is to understand the purpose of the legislation and the intention of the legislators.

The navigation rules are prescribed to secure uniformity of practice for the sole purpose of preventing collisions. One of the most fertile sources of collision was uncertainty of the course and intention of an approaching vessel. One of the best ways of avoiding a collision is to stop vessels before they get to a point of contact. Hence the general rule which covers all situations arising "*from any cause*" set first in the order of rules, viz.,—blow the danger signal when, "*from any cause,*" you don't "*understand the course and intention*" of the other vessel. This is the cardinal and first rule of safety; and the situation which has arisen in this

case shows the evils that would come from an interpretation of the law so narrow as to change the plain, simple command of the regulation.

After navigators are given this general rule of safety to protect under all circumstances, legislation begins with respect to the details of navigation for the same broad purpose of preventing collisions. The rule to pass to the right; to pass to the left; the overtaking rule; the crossing and approaching rule are all to be used in clear weather, but in fog, etc., only the fog signal is to be used and none of the passing or overtaking or approaching rules are to be used until the vessels can see each other. Why this restriction? We all have heard of the many collisions occurring because the navigator of one vessel, in such weather, mistakenly *thought* he knew the location of the other vessel from the apparent direction of the sound. Safety being the sole purpose of the rules, the use of these passing signals was prohibited until the vessels were in sight of each other.

When the great purpose of the legislation is kept in view, together with a knowledge of the causes for many collisions, we see Congress and the Department intrusted with the safety of marine commerce, providing against every contingency. What possible good could be served by providing exceptions to the general rule to stop when in doubt? Why go from the simple to the complex for no good pur-

pose? When two vessels are stopped, of course, they cannot collide. Therefore, when one vessel is in doubt, she is given permission to require the other to stop, and to compel co-operation to avoid disaster.

From pages 95 to 98 and from pages 134 to 136, appellant quotes the proceedings before the International Marine Conference concerning the use of 3 whistles to indicate "I am going astern," and draws certain conclusions therefrom. It was there said by Captain Sampson, representing the United States (app. brief, 135-136), that this movement (going full astern) may be "the direction to avoid a collision or *it may be the direction to produce a collision.*" The Conference voted not to adopt section e, viz., "A steam vessel, when her engines are going full speed astern, shall sound on her whistle three short blasts." The discussion was concerning rules to prevent collisions in fog and thick weather, and it was apparently decided that changing the position of *but one* vessel might produce the collision, which it was the desire to prevent.

But how different the rule which requires both vessels to stop on the danger signal and back until their headway is checked. Capt. Malmberg, of Sweden, said (app's brief, 135): "The safest way in a fog is to lay the ship dead still." It will surely be doubly safe if both ships lay still until they know each other's position and intention. The stopping of both vessels, as required by the rule, insures the

avoidance of a collision, regardless of whether the vessels can see each other. The appellant's argument, however, condemns either the truthfulness of the Virginian's witnesses or their good seamanship, for these three whistles were sounded by the Virginian when her bridge officers say they could not see the Strathalbyn.

The argument against the adoption of the three-whistle rule except when vessels are in sight of one another only accentuates the necessity for a rule to prevent collisions when vessels are not in sight and the situation concerning one is such that there is doubt upon the part of the other as to her course and intention.

Another rule for the interpretation of statutes is, that when the legislature includes one subject, it is the intention to exclude others. Applying this rule to Art. 28 of the International Rules (26 Stat. at Large, p. 320): The introductory sentence to that section is as follows:

“Sound signals for vessels in sight of one another—

One short blast means: I am directing my course to starboard.

Two short blasts means: I am directing my course to port.

Three short blasts means: My engines are going full speed astern.”

This is all the article contains, and is the substance

of Rule 1 and Rule 8 of Art. 18 and Art. 28, the Act of Congress relating to the navigation of vessels on the harbors and waters of the United States, 30 U. S. Stat. at L., p. 96. Rule 9 is an *express* statutory prohibition against the use of these passing signals except when the vessels are in sight of each other, instead of an implied prohibition such as is contained in the International rules. If Congress wanted the danger whistle to be used only when vessels are in sight of each other, then it would have been included in the enumeration of the whistles to be used when vessels are in sight of each other.

In addition to the above considerations, the district court, in its decision, has assigned sufficient reasons for reaching the conclusion that the danger whistle should have been blown by the Virginian "immediately" (in the language of the rule), when her pilot was in doubt.

"The Virginian was not in doubt as to the course and intention of the Strathalbyn," says appellant at page 136 of its brief.

In cross-appellant's opening brief, at p. 119, is the commencement of Duffy's testimony bearing on the last above assertion. Duffy was in control of the Virginian's navigation. On page 120, his testimony is quoted as follows:

"Q. Now, I suppose you were in some doubt as to what was ahead of you?

A. Yes.

Q. I suppose you were in doubt as to the direction that vessel ahead of you was going in, were you not?

A. Yes, sir.

Q. You were in doubt as to the course it was taking, too?

A. Yes, sir.

Q. And you were in doubt as to the speed she was going?

A. Yes, sir.

Q. You did not know what they intended to do on board the Strathalbyn at the time they whistled to you the first time?

A. No, sir.

Q. Who was in control of the navigation of the Virginian?

A. I was pilot.

Q. You had control?

A. Yes, sir."

Is the statement that the Virginian was not in doubt based on the evidence?

On page 140 of appellant's brief, it is said:

"It was her" (Strathalbyn's) "positive duty to have indicated this danger to the *Virginian*, who was in the dark, so to speak, as to the Strathalbyn's position."

Is not this inconsistent with the position that the Virginian knew the course and intention of the Strathalbyn?

And on page 146 of its brief, appellant says:

“The Virginian had no means of knowing the Strathalbyn was not performing her duty,”

viz., to port her helm (appellant’s brief, p. 68). Then how can it be consistently asserted the pilot of the Virginian was not in doubt concerning the Strathalbyn’s course?

As soon as one navigator is “in doubt,” from “any cause,” of the course and intention of the approaching steamer, the rule says: “Immediately” sound your danger signal. Yet appellant, on page 138, says: “Fault cannot be predicated upon failure of one vessel to sound an alarm when the developing danger is not apparent.” What is meant by “apparent” is not quite clear, for, if one vessel knows another is approaching within whistling distance, but does not know the position, course or intention of that approaching vessel, it must then become sufficiently apparent there is danger of collision to raise a doubt as to the wisdom of proceeding without possessing knowledge of the position, course and intention of such vessel. Then, the rule says: Blow the danger, stop both vessels, acquaint yourself with the location, course and intention of the approaching vessel and then proceed. The rule says: “Be sure you are right, then go ahead.” Had the Virginian blown the danger, performed this simple act of caution, then the Strathalbyn’s pilot would not have been navigating under the impression his

lights were visible if they were not (as suggested by appellant's brief, at page 131).

On page 98 of its brief, appellant begins an attempt to show the Virginian's engine room log time is harmonious with the testimony of her bridge officers. To do this appellant intimates that her chief engineer made a mistake in entering in the log book the time of the collision, or that the time of collision so entered does not show the correct time. Not satisfied with drawing conclusions concerning the position of the various vessels and the time elapsing between the signals and the collision contrary to the positive testimony of the eyewitnesses from the Flyer and the Virginian's bridge officers, a resort is now had to show that the Virginian's engine log record is not reliable. On page 107 of the brief, appellant speaks of the time the stop signal was given, figuring it from the bridge officer's estimate of the time elapsing after passing Pully Point. It is said Green heard the telegraph to stop, "which would be at 7.56." The engine room log gives it at 7.57. On page 99, appellant italicizes the statement that Crerar and Beecher (captain and pilot of the Strathalbyn respectively) "*both testify that they saw the back water from the Virginian's propeller coming FORWARD under the Virginian's starboard quarter at the time the Virginian blew her three whistles.*"

Crerar's testimony on the question of the water coming *forward* is found at Apostles, p. 242:

"Q. Did you observe whether or not the Virginian was backing at the time you came into collision?

A. Just before she struck us, Captain Beecher directed my attention to the wash of her water coming up.

Q. Where did it appear to be?

A. Around her stern.

Q. How far forward?

A. *It did not get forward at all*, but was just beginning to come up. Captain Beecher remarked: 'He is just going astern now.'

Q. How long was that before the collision?

A. Twenty or thirty seconds; about the same time he blew the danger signal."

Does the above evidence justify the Virginian's italicized statement above quoted?

Appellant says, on page 99 of its brief:

"The chief engineer took this memorandum log book from the engine room and made up the engineer's log, as follows:

Stop 7:57; full astern 7:58; stop 7:59; ahead slow 8:09.

In collision with the S. S. Strathalbyn at 7:58 p. m.

This latter entry, as the time of the collision with the Strathalbyn, was, therefore, *not made*

from any original record kept prior to or at the time of the collision." (The italicized portion is italicized by appellant).

And, on page 104, in italics, appellant says:

"When it is remembered that no entry of the time of the collision was made in the memorandum engine room log."

Henry Trippense, the chief engineer of the Virginian, testifies (see 913 of Apostles):

"Q. Your log book shows *you came into collision* at 7:58 and that you went full speed astern at 7:58?

A. Yes, sir.

Q. That was the entry you made from the information you received at the time *from the book, from that small book?* (Speaking of engine room scrap log).

A. Yes, sir.

Q. And at that time you did not know there was anything wrong with this entry?

A. *I entered that from the small book when it came up out of the engine room."*

Again, is appellant's statement founded on the evidence?

We agree with appellant's statement on p. 101 that the engine room log entries are made according to the nearest minute. There is not a word of testimony from the Virginian's engineers that the collision occurred either before or after 7:58. It probab-

ly occurred so close to 7:58 that there was no object in recording the seconds. All marine men know that the time of collision is an extremely important entry, and we surmise no engineer is going to inaccurately state it in his record. Without some testimony, we hardly think it fair to extend the time between the engine room signals to the extreme limit of possibilities in favor of the *Virginian*, especially in the face of the testimony of Trippense on the subject, as appears in *Apostles*, at page 909:

“Q. According to your best judgment, about what time had elapsed from the time the engines were reversed until this collision?

A. Well, that is pretty hard to say; I think it must have been—well, I could not make any estimate, because you know a minute is short when you are not looking for it, and it is long when you are looking for it, and I could not make any estimate except I go by the record in the book.”

On page 862 of *Apostles* Green says it was from 30 seconds to a minute between the telegraph to stop and full speed astern.

The *Strathalbyn* frankly admits that the *Virginian* reversed after the *Strathalbyn* blew her danger and after the *Virginian* blew the three whistles which indicated her engines were going astern. What the engine log does show is that the stop, reverse and collision all could have, and probably did, transpire within a minute.

On page 106 appellant refers to the testimony of the Virginian's engineer, Trippense, in this way: "He could stop the Virginian in a little over a minute, and that his ship was stopped when the collision occurred." (at app. 909). Trippense says: "A. Well, I think the ship was stopped when the collision occurred." At App. 909 Trippense says: "A. On

Page 119 of Appellant's Brief
occurs the following:

"The Virginian's officers testify positively that she was *reversing at least a minute* before the danger signal was given, and had been going full speed astern, at least two minutes before the collision."

Three minutes reversing, by this statement. A little over a minute to stop the Virginian, according to Trippense. Then the Virginian was for possibly two minutes actually making sternway away from the Strathalbyn, if each of the above statements relied upon by the appellant is true. Unfortunately the testimony of no one supports the conclusion that the Virginian was backing away at the time of the collision. She was coming rapidly into the Strathalbyn. Her backing for 20 to 30 seconds checked her headway, and when her stem tangled with and started to break, cut and bend the steel beams and plating of the Strathalbyn's stem and bow, then the Virginian's headway was further checked and she would not be making the cut into the Strathalbyn for much longer than 20 seconds, as testified to by Dickie. This is further corrobor-

ated by the engine room log, because the *Virginian* had backed away from the *Strathalbyn* and her engines were stopped at 7:59, or one minute after the recorded time of the collision.

We submit the evidence clearly shows the *Virginian* did not reverse until after the *Strathalbyn* blew the danger signal and until the *Virginian* blew the three signal blast which was used to indicate her engines were going astern. The signal to indicate the reverse engine movement in all probability was given when the movement commenced.

On page 68 of appellant's brief, the *Strathalbyn* is charged with what is termed the "most serious" fault in connection with the collision, viz.: the failure of the *Strathalbyn* to port and go to starboard on giving the passing whistles.

We expect this court to follow the rule for weighing evidence laid down by the Supreme Court of the United States in

*The New York and Liverpool United States
Mail Steamship Co. vs. Otis P. Rumball*, 21
How. 372; 16 Law. Ed. 144,

in which the Supreme Court says:

"One remark is applicable to all the witnesses introduced by the respondents" (the steamship) "and that is, they had not the same means of knowing respecting the matter in dispute as the witnesses for the libellants" (the brig) "possessed, who had charge of the brig

and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libellant speak with actual knowledge, and unless they have wilfully stated what they know to be false, their statements must be correct. They were on the deck of the vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration."

The *Virginian* is charging the *Strathalbyn* with serious fault of not porting when the *Strathalbyn* was whistling for a port-to-port passage, and the burden is upon the *Virginian* to prove this fault.

As was said in the case of

The Diana, 18 Fed. 263:

"The *Bolston* has charged the *Diana* with fault and filed a libel for the damage she sustained. The *Diana* has alleged that the *Bolston* was wholly at fault, and has also libelled the vessel for the damages to the *Diana*. The burden of proof is therefore upon each party to prove the charges it makes and the cross allegations put the court under the necessity of determining the facts from the theories of both parties rather than to see if either one has sustained the burden of proof."

The testimony (Ap. 206, 207, 288, 289, 241, 327, 329, 330) of Capt. Beecher, Mr. Purdy, Capt. Crerar and Russell, who had active charge of the

navigation of the Strathalbyn, is that the Strathalbyn's helm was ported and her head was swung to starboard when the whistles were given, and unless each is deliberately testifying to what he knows to be false, their testimony is entitled to be believed. And, strange to say, the actual navigators, who were on the scene and observed all that was going on and whose duty it was to avoid the collision and whose every impulse was to turn the head of the Strathalbyn to starboard, are charged with not porting, and held to be deliberate falsifiers upon the expert testimony of ship surveyors who do not attempt to be more definite than to say that the vessels came into collision in a "nearly" head-on position. As appears from the reading of this expert testimony of these marine surveyors, they but speculated upon the probabilities from indefinite knowledge of the character of the damage to the Strathalbyn. It is almost inconceivable that any court could so magnify the credit to be given to this class of testimony that it could hold it to overcome and outweigh the testimony of the men who participated in the navigation of the Strathalbyn, who were in duty bound to save that vessel, and who had the responsibility of the lives of the crew on their shoulders, especially when the testimony of these bridge officers that they did port is corroborated by the testimony of independent expert witnesses who had the details of damage to the Strathalbyn's bow before them and drew their conclusions

therefrom, which conclusions are sufficiently different from those drawn by the surveyors employed by the *Virginian* to testify in this case, to corroborate all that the bridge officers on the *Strathalbyn* had testified to. Can there be any doubt that Pilot Beecher knew his ship was heading inside of Pully Point after he first ported, and that she was heading for the gravel pit the next time? Who would be in a better position to observe this fact than Beecher? And who would be in a better position to corroborate him than Crerar and Purdy, the man at the wheel?

The court will have to find some positive, definite and conclusive evidence that these men are falsifying in their statements before it will be justified in holding them to such an inconceivable fault as to refuse or fail to port when for five minutes, or such a matter, the approach of the *Virginian* appeared to demand that very maneuver for the safety of the *Strathalbyn*, and when the passing whistles given by the *Strathalbyn* called for the maneuver, and when there is no reason of which we can conceive which would justify any other course of navigation. The *Virginian* must overcome the probabilities, which are all in favor of the *Strathalbyn* swinging her head to starboard. Our contention is, that there is no testimony of sufficient weight to, or of such character as does, justify discrediting the *Strathal-*

byn's navigating officers and making them out perjurers, pure and simple. The Strathalbyn ported her helm as testified to by Beecher, and the vessels came into collision upon the angle as testified to by the other eyewitnesses in the case, and we feel confident this court, applying the rules for weighing conflicting evidence of the character mentioned, will vindicate these witnesses and maintain them in their testimony concerning the Strathalbyn's navigation in this respect.

Pages 74 to 85 of appellant's brief are devoted to upbraiding the Strathalbyn for not carrying a range light. There isn't any question but what she was an ocean-going steamer, and there isn't any question but what the rule which permits ocean-going vessels to navigate our waters without a range light, has stood as the rule during all the time since and prior to the International Marine Conference of 1899, from which appellant extensively quotes, and since the case of "The Conoho," referred to on page 80 of appellant's brief. That ocean steamships ply our waters without range lights is such common knowledge that it does not need proof to anyone who is familiar with the ordinary course of such commerce, and we do not take seriously the charge that the Strathalbyn was in fault for doing that which the rules expressly permit her to do, viz.: to navigate the inland waters

connecting with the sea without carrying a range light.

We are charged with negligence for not having a range light because the *Virginian* says she could have told our course had we had one, even though she says she could not see the side lights, but the plea is made that the *Virginian* didn't see the *Strathalbyn's* masthead light, possibly because it became confused with a shore light, although some witness for the *Virginian* expressly testifies that it was not the character of a light that he could confuse with a shore light. If it were so easy and simple to confuse the big masthead light of the *Strathalbyn* with a shore light, we don't doubt but what the range light could just as easily have been confused. When a vessel has not a vigilant lookout aboard, it makes no difference the kind of lights carried by an approaching vessel, and if a vessel has a vigilant lookout aboard and the officers refuse to comply with passing whistles, then it makes no difference what kind of lights the approaching vessel may carry. When it becomes wise and necessary, in the ordinary practice of steamboating for ocean-going vessels, to carry range lights, then we anticipate that Congress and the department having control of such navigation will prescribe the use of such lights. We hardly expect this court, any more than the lower court, will legislate that such lights must be used, in the face of an express permission

in the statute not to use a range light upon ocean-going steamers.

On page 38 of appellant's brief, we find the commencement of the discussion of the negligent navigation of the *Strathalbyn* prior to the collision, and this discussion continues, with the citation of many cases, through to page 68. The *Strathalbyn* has cited, and relies upon, the case of *The New York*, 175 U. S. 187, as a complete justification of her navigation, and the *Virginian* relies upon this case to condemn the *Strathalbyn's* navigation. If the *Strathalbyn*, in due time, did that for which the *Conemaugh* was condemned by the court for not doing, then we take it the *Strathalbyn* has navigated in accordance with safe navigation as prescribed in that case. On page 51 of appellant's brief, it appears that the *Conemaugh* had three times signaled her wish to pass starboard-to-starboard. This was a departure from the established rule. The *New York* failed to reply to the *Conemaugh's* signals, and the *Conemaugh* construed her failure to reply as an acquiescence in her own signals. The *Conemaugh* was condemned because she did not stop until the mystery of the *New York's* silence was explained. Let us compare the *Strathalbyn's* navigation. When the *Strathalbyn's* second whistle was blown to the *Virginian*, she stopped. Her pilot had evidently learned, as said on page 51 of appellant's brief, quoting page 207 of the *New York* opinion:

“The lesson that steam vessels must stop their engines in the presence of danger or even of anticipated danger.”

Before leaving the New York case, it is interesting to note that the Conemaugh had construed the New York's failure to answer as an acquiescence in the Conemaugh's signals. The master of the Conemaugh did not construe the New York's neglect to answer the three signals as a message from the New York that the Conemaugh was invisible or her lights could not be seen. The construction put by the Conemaugh's master upon the New York's silence does not tend to confirm appellant's statement that the Virginian's silence could alone mean: “I cannot see your lights.”

The Duluth Steamship Co. vs. Pittsburg Steamship Co. is cited as a case to condemn the Strathalbyn. The Bessemer was condemned because she did not stop or blow an alarm signal when she saw the Sylvania navigating contrary to the agreement as it was understood by the Bessemer. The Strathalbyn cannot be condemned as was the Bessemer, because she did stop some four minutes before the collision, and did blow an alarm signal, and the Strathalbyn did stop when the Virginian's red light commenced to get dim. We contend that we did not speculate as to whether or not we should adopt the safest course, but that we did adopt that course, and, having adopted the safest course,

by stopping, as prescribed in the two above referred to cases, and told the Virginian to go to starboard, through our whistles, we cannot possibly be condemned for fault in the navigation of the vessel.

On page 59 of appellant's brief is another quotation from the New York case above referred to. It is said it was the duty of the Conemaugh to have stopped her engines after the second signal, and, if necessary to bring the Conemaugh to a complete standstill, to have reversed them. This is exactly what the Strathalbyn did do, and, considering the speed of the Strathalbyn and the Virginian as they were approaching, she did this in sufficient time to have avoided the collision had the Virginian co-operated, as she was bound to do by all the rules and practice of navigation.

In order to condemn the Strathalbyn for negligent navigation under the rule announced in the cases cited in appellant's brief, this court must hold that all the officers of the Strathalbyn testified falsely concerning her engine movements, and that the written engine room log of the Strathalbyn is a deliberately concocted piece of evidence. There must be something in this case more than a charge of negligence to discredit the testimony of as reputable navigators as stood upon the bridge of the Strathalbyn and to discredit the testimony of Sandilands, her faithful old engineer. Everything in the circumstances, whether duty or conditions,

corroborates the testimony of these men and speaks for its verity, for there is no evidence of a certain, positive or definite nature which contradicts it, and there is nothing in the circumstances surrounding the collision to refute it.

In our opening brief, we have referred to the testimony of the eyewitnesses who saw the Strathalbyn's lights prior to, substantially at the time of, and after the collision, and we can only add, in this connection, that we hope the court will read the Apostles and the testimony of these witnesses without prejudice but in an honest endeavor to reconcile the testimony of all the disinterested witnesses concerning the lights, and we feel confident that this court will apply the ordinary rules of evidence and give due weight to the testimony of eyewitnesses and will check the bold attempt of the Virginian's officers to justify their non-observance of the lights by testifying they were obscured and dim, so that they did not, and could not, see them as the Strathalbyn was approaching the Virginian. We feel that the court cannot overlook the fact that the Flyer, meeting the Strathalbyn, exchanged the ordinary passing signals; that men upon the Flyer made her out by all her lights; and that nothing unusual or extraordinary was thought of the Strathalbyn or her lights; that every remark or inference from the passengers on board the Flyer was that they couldn't understand why

the Virginian was navigating either as though her master were drunk or from some other inexplicable cause. The testimony of the Strathalbyn's officers is corroborated by many eyewitnesses, in respect to her lights, navigation and whistles. The testimony of the Virginian's officers is contradicted by the engine room record, and appellant discredits its own engine room log and its bridge officers' testimony. All the witnesses from the Flyer contradict the Virginian's officers on the point that the Strathalbyn's lights were flaring up and going down; and we ask the court, in weighing the testimony of the Virginian's officers, to give due regard to these facts, and to give their testimony only such weight as these facts warrant.

With respect to the decree: We are not sure that the Strathalbyn is called upon to answer the assigned error in connection with it, but it appears that if there is any error, it is entirely harmless and can work no injury to the Virginian. If she pays the debts she owes in the manner provided by the decree, she suffers no loss, and if she does not pay the debts she owes in the manner provided by the decree, an execution against her will not damage her in any way. The damages are divided. The Virginian simply has to pay to the cargo owners what she owes them, according to the decree, before she can recoup, under the decree, from the Strathalbyn. It seems strange that the

Virginian can find error in a decree which only compels her to pay a just demand.

The Virginian complains about the allowance of interest and costs. Interest and costs are allowed to both parties as a part of their damage. In the discretion of the lower court, this seemed equitable and fair. The lower court held that the fault of the Virginian was substantially as much a factor in bringing about the collision as the fault of the Strathalbyn was substantially a factor in so doing. The fact that the lower court first considered the faults of the Strathalbyn in its opinion is no reason for claiming that those faults are the primary faults of the collision. If the faults of the two vessels concurred in bringing about the collision, then the damages should be divided. The courts have remarked upon the ease with which the primary or principal fault may be attached to one vessel because of the order in which the court considers the case, and so in this case it appears that great stress is laid by appellant on the primary fault of the Strathalbyn, she having been first referred to in the lower court's opinion. We cannot see, and neither could the lower court, that there is any more iniquity in failing to have proper side lights, and thereby violating a statutory rule, than there is iniquity in failing to blow the danger signal when in doubt or in failing to reverse in time to avoid a collision, or in failing to

go to starboard when so directed to do, all of which are statutory rules, and any one of which, if observed, would have prevented the collision.

As bearing on this point, we will quote from the case of

Chamberlain vs. Ward, 21 How. 548; 16 Law. Ed. 221, as follows, which case was decided after the New York case above referred to:

“Failure to comply with the regulation in case a collision ensues is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect, but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights, in cases falling within the Act of Congress, renders the vessel liable to the extent already mentioned; but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable or practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. * * * All we mean to decide is that the neglect of the propellor to show signal lights did not vary the obligations of the Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision,

as the circumstances in which she was placed gave her the opportunity to employ."

United States vs. Erie Railroad Co., 122 Fed. 50 (page 56):

"This court has repeatedly held the fault, and even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require. *The Maria Martin*, 12 Wall. 31, 20 L. Ed. 251; *The America*, 92 U. S. 432, 23 L. Ed. 724; *The Lucille*, 15 Wall. 676, 21 L. Ed. 247; *The Sunnyside*, 91 U. S. 208, 23 L. Ed. 302."

We respectfully assert that if the decree of the lower court is affirmed, dividing the damages, then there is no room to contend in this case that interest and costs should not be allowed each party and also be divided, and we again ask the court to hold the Virginian solely at fault for the errors mentioned.

Respectfully submitted,

HUFFER & HAYDEN,

W. H. HAYDEN,

F. A. HUFFER,

Proctors for Appellee and Cross-Libellant, Strathalbyn Steamship Company, Ltd.

Tacoma, Washington.

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

BRIEF FOR APPELLEE, STRATHALBYN STEAMSHIP COMPANY AS BAILEE OF THE CARGO OF THE SS. "STRATHALBYN".

IRA A. CAMPBELL,

MCCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellee.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....

Deputy Clerk.

No. 2728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a
corporation), owner and claimant of Steam-
ship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a
corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a
corporation), owner and claimant of Steam-
ship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., (a
corporation), as bailee of a cargo of lumber
consisting of 3,563,011 feet, and for the use
and benefit of the owners and insurers of
said cargo,

Appellee.

**BRIEF FOR APPELLEE, STRATHALBYN STEAMSHIP
COMPANY AS BAILEE OF THE CARGO OF
THE SS. "STRATHALBYN".**

The brief of appellee and cross-appellant Strathalbyn Steamship Company, Limited, so thoroughly and ably

presents the question of the liability of the "Virginian" that we refrain from burdening the court with additional discussion on that point. We, therefore, adopt that portion of their brief, and submit respectfully that the decree condemning the "Virginian" should be affirmed.

THE "STRATHALBYN" IS NOT RELIEVED FROM ITS CONTRIBUTION TO THE "VIRGINIAN" BECAUSE OF THE PROVISIONS OF THE CHARTER PARTY.

The appellee and cross-appellant contends that the "Strathalbyn" is relieved from all liability to the cargo owner by a contract between it and the charterer exempting the "Strathalbyn" from damages arising out of a collision.

The innocent cargo owners' position in a case of mutual fault has been so often commented upon and is so thoroughly understood by this court that no good purpose would be served in burdening it with citations of the many cases in which their position is defined.

In

The Atlas, 93 U. S. 302, 23 L. Ed. 863, 7-8,

the Supreme Court said:

"Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong; and the owners of the cargo may sue the owners of one of the ships, or both; * * * the court never intended to adopt a theory which would fail to give innocent parties full compensation suffered by a collision, and that they never meant to extend the moiety rule so as to do an injustice

to an innocent tow, or to the owner of cargo.
 * * * Innocence entitles the loser to full compensation from the wrongdoer, * * *.'"

In this case the libel was filed against the "Virginian" by the Strathalbyn Steamship Company, Ltd., on behalf of the consignees and insurers of the cargo, and a decree against that vessel for the losses suffered by them was duly entered.

It is apparent, therefore, that if the decree condemning the "Virginian" be affirmed, the cargo owners and their underwriters have no interest in the question as to the obligation of the "Strathalbyn" to contribute its share of the cargo losses to the "Virginian".

We respectfully submit, however, that the "Strathalbyn" is not relieved from such duty of contribution by the provisions of the charter party.

The charter party, the contract mentioned by cross-appellant, was between the Strathalbyn Steamship Company, Limited, on behalf of the owners of the vessel, and the American Trading Company, the charterer. The cargo owners were not parties to it.

It is urged in the brief of cross-appellant that

"the charter party exempts the 'Strathalbyn' from liability to the *charterer* for damage arising from the collision" (page 124).

But it is nowhere stated or claimed that the charter party exempts the "Strathalbyn" from liability to the innocent cargo owners or their underwriters for damages to cargo from collision, or any other cause.

In

The Maine, 161 Fed. 401,

upon which cross-appellant relies, the libelant contracted with a lighterage company for the transportation of his goods about New York Harbor. The contract, which was not in the form of a charter party, provided that in consideration of the low rate agreed upon, no underwriter claiming through the libelant was to have any claim upon the lighterage company, or upon any equipment or boats that they might charter or control. The libelant, the cargo owner, on behalf of the underwriters, filed a libel against both the "Maine" and the "Manhattan" for damages sustained because of a collision between the vessels. Both vessels were held in fault. The libel against the "Manhattan", however, was dismissed upon the ground that there was a contract between the *libelant* and the "Manhattan" relieving the latter from responsibility for such a loss. The court also held that the vessel was not a common carrier, and could, therefore, contract against its own negligence. It did not hold, however, that because the "Manhattan" was a private carrier it was relieved from liability. Upon the contrary, the decision is expressly placed upon the ground that the libelant had contracted away any right of recovery against the "Manhattan".

The case does not present, as does the one at bar, the question of the rights of the innocent cargo owners. There the libelant contracted away his rights to hold

the "Manhattan". The underwriter claiming under him was, of course, subrogated only to such rights as the libellant had. It, therefore, was in the same position as the cargo owner.

In this case the charterer may have contracted away his rights to proceed against the "Strathalbyn", but the consignees and insurers of the cargo aboard the "Strathalbyn" have not, by the charter party, so contracted.

The distinction between the two cases is apparent from the language of the court itself, where, in comparing the libellant to an innocent cargo owner, it said:

"It was not a wrongdoer, but it had stipulated away its rights so far as the 'Manhattan' was concerned, *and cannot be deemed an innocent party.*"

The decree in this case is in favor of the bailee of the cargo for the "use and benefit of the owners and insurers of said cargo" (Ap., p. 1438). The charterer, the party to the charter party, is not therein mentioned and is not interested in it.

Conceding, therefore, everything that cross-appellant contends that *The Maine* decides, we respectfully submit that it does not lay down a rule which would support a holding that "innocent cargo owners and insurers of said cargo" had stipulated away their rights of recovery against the "Strathalbyn" because of a certain provision in the charter party to which they were not parties.

The case is no different, then, than the many in which the right to contribution has been upheld.

The Chattahoochee, 173 U. S. 540; 43 L. Ed. 801;
Erie Railroad Company v. Erie & Western Transportation Company, 204 U. S. 220; 51 L. Ed. 450.

The decree is against the "Virginian" for the full amount of the damages suffered by the innocent cargo owners. Such a decree is proper where the cargo owners proceed against one vessel and the two vessels in collision are held in fault.

The Atlas, *supra*;

The Beaconsfield, 158 U. S. 303; 39 L. Ed. 993.

The "Virginian", then, is not affected by the relation between the charterer or cargo owners or underwriters and the "Strathalbyn". Her owner's right to contribution is separate and distinct from that relation. It was so decided by the Supreme Court in

Erie Railroad Company v. Erie & Western Transportation Company, *supra*,

where the contention urged by cross-appellant was presented.

The court there said:

"The liability of the New York, under our practice, for all the damage to cargo, was one of the consequences plainly to be foreseen, and, since the Conemaugh was answerable to the New York as a partial cause of the tort, its responsibility extended to all the manifest consequences for which, on the general ground that they were manifest, the New York could be held. Therefore the contract relations between the Conemaugh and her cargo have nothing to do with the case. See *The Chat-*

hoochee, *supra*. More specifically the last named vessel's liability to the New York is not affected by provisions in the Conemaugh's bills of lading, giving her the benefit of insurance, and requiring notice of any claim for damage to be made in writing within thirty days, and suit to be brought within three months."

A still stronger reason may be urged in support of the right of the "Virginian" to contribution. If we grant that the Harter Act is not applicable to the "Strathalbyn", the latter, of course, could not claim the benefits of section 3 of the Act, relieving a vessel, to which it is applicable, from errors in navigation. If, therefore, it be true that the Act did not apply to the "Strathalbyn", she remains liable for damages occasioned by errors in her navigation, unless she was relieved therefrom by her contract of carriage.

In other words, if the "Strathalbyn" should be deemed a private carrier, and the Harter Act be held not applicable to her, then her liability as such private carrier would be greater than that of a common carrier as against negligent navigation so far as any protection was afforded by the law. When, therefore, the Strathalbyn Steamship Company, Limited, as such private carrier provided by its contract against negligence in navigation, it was only taking unto itself the same protection as that accorded to a common carrier by the Harter Act.

This being true, granting that the Strathalbyn Steamship Company, Limited, was only a private carrier, its rights and liabilities as against the cargo owners, so far as the damages from the negligent collision were concerned, were identically the same as they would

have been against the cargo owners if the "Strathalbyn" had been a common carrier under the Harter Act.

But we have seen that under the settled rule of *The Chattahoochee*, the Harter Act does not relieve a vessel in fault for collision from contributing to the damages suffered by the other vessel, including the latter's recoupment of a moiety of the cargo losses of the first vessel. Equally, then, the private carrier, which, by reason of its special contract, stands in the same relation to the cargo owners so far as liability for losses from the collision are concerned, should fall within the scope of the rule in *The Chattoochee*.

We respectfully submit, therefore, that even on the theory advanced by appellee and cross-appellant as to the character of the "Strathalbyn" as a carrier, the "Virginian" is entitled to recoup one-half of the cargo losses as provided by the decree.

THE "STRATHALBYN" IS ALSO LIABLE TO THE INNOCENT CARGO OWNERS.

For the same reasons as previously mentioned, that is because the cargo owners and their underwriters are not parties to the charter party, and because the "Strathalbyn" is not protected by the Harter Act, the innocent cargo owners are not precluded from recovering their full damages from the "Strathalbyn".

If, therefore, the court should be of the opinion that the "Virginian" is not in fault, a decree, we submit, should be entered against the "Strathalbyn" awarding the cargo owners their full damages.

**THE APPELLANT'S OBJECTIONS TO THE FORM OF DECREE
ENTERED IN THESE CONSOLIDATED CAUSES IS WITHOUT
MERIT.**

The decree provides that the bailee of the cargo recover \$8253.85, the cargo damages, from the "Virginian", and that execution for such amount issue. It also provides that before execution issues upon the amount decreed the Strathalbyn Steamship Company, Limited, there shall be deducted from such amount, to wit, \$27,429.03, one-half of the cargo damage, viz., \$4126.92; that execution on such deducted amount, \$4126.92, be stayed (1) until the time of appeal expires; or (2), if an appeal intervenes, until the filing of the mandate, unless the appellate court should hold the "Virginian" free from fault. The decree further provides that upon the payment by the "Virginian" of the amount decreed the bailee of the cargo, to wit, \$8253.85, execution in favor of the Strathalbyn Steamship Company, Limited, for the said deducted amount, to wit, \$4126.92—one-half of the cargo damage—be perpetually stayed, or judgment satisfied.

It is apparent, therefore, that the "Virginian", because of the mutual fault of the vessels, is thus allowed to recoup from the "Strathalbyn" one-half of the cargo damage.

Three contingencies are thus provided for: The first need not be considered because an appeal was taken; so also with the second, because a decree from this court, relieving the "Virginian" from liability, would prevent the issuance of an execution against her; and the third, by paying the bailee of the cargo the whole of the cargo losses, to wit, \$8253.85, execution for the

deducted amount of \$4126.92 shall be perpetually stayed. The last contingency is the only one here presented for consideration.

By the decree the "Virginian" is liable to the Strathalbyn Steamship Company, Limited, for the amount decreed the latter, to wit, \$27,429.03, less one-half of the cargo damage, viz., \$4126.92, provided the owners of the "Virginian" pay the cargo damage to the bailee thereof promptly. It is thus clear that if the "Virginian" pays the amount of the cargo damage, execution in favor of the owner of the "Strathalbyn" for the deducted amount will be perpetually stayed. The sole purpose of that portion of the decree, then, is to enable the innocent cargo owners to recover, without delay, their damages in full, for the stays in execution provided for by the decree only operate as between the owner of the "Virginian" and the owner of the "Strathalbyn".

The sole objection of appellant to the decree is that it should not be compelled to pay the bailee of the cargo *promptly*. Inasmuch as this is the manifest effect of the decree, it cannot be regarded as unjust, for a decree that holds a vessel in fault cannot be said to be unjust because it is drawn so as to compel the owner of the vessel to promptly respond in damages for the losses suffered by the innocent cargo owners. If the owner of the "Virginian" obeys the mandate, assuming the decree will be affirmed, it can have no possible cause for complaint. Appellant concedes that fact (brief, p. 151), but it then urges, in effect, that it is "unjust" to *prohibit* it from *delaying* the payment of the amount decreed to the cargo owners.

Furthermore, the "Virginian" is given a right of contribution; that is, a right to deduct one-half of the cargo damage from the amount awarded to the "Strathalbyn" in the event that she (the "Virginian") pays the whole of the cargo damage. If she does not pay those damages, she is not in a position to claim contribution or recoup one-half thereof from the "Strathalbyn". The decree thus very carefully provides that the deduction shall be had if payment to the innocent cargo owners has been made.

The innocent cargo owner should be first paid. "He", says the Supreme Court,

"* * * ought not to suffer loss by the desire of the court to do justice between the wrongdoers".

The Alabama and

The Gamecock, 92 U. S. 695; 23 L. Ed., at p. 764.

We respectfully submit, therefore, that whatever may be the view of this court as to the form which the decree ought to take, the innocent cargo owners should be protected in a prompt collection of their full damages, interest and costs. The latter should not be sacrificed to the convenience of the "Virginian".

THE APPELLANT'S OBJECTION TO THE ALLOWANCE OF INTEREST AND COSTS TO THE INNOCENT CARGO OWNERS IS ALSO WITHOUT MERIT.

The reason assigned in support of the objection to the allowance of interest and costs in favor of the cargo owners is that the bailee of the cargo caused an

independent libel to be filed against the "Virginian" for the losses suffered by its owners.

In the first place, we disagree with appellant's construction of the libel in cause No. 1036 of the records of the lower court. That libel is brought solely for the damages suffered by the owners of the "Strathalbyn".

The libel proceeds in part as follows:

"The libel and complaint of Strathalbyn Steamship Company, Ltd., a corporation, owner of the steamship 'Strathalbyn', her tackle, apparel, furniture and boilers, against the steamship 'Virginian', her engines, boilers, tackle, apparel and furniture, and against all persons intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:"

Article 5, upon which appellant relies in support of its contention, then alleges:

"That by reason of the collision and the careless and negligent acts and omissions aforesaid done and permitted on the part of the 'Virginian' libelant has suffered damage in the injury of said 'Strathalbyn' and the loss and damage of equipment, gear and property aboard of her, and by reason of the loss of the use of said vessel and the cost and expense of removing and replacing her cargo, and repairing the damage done thereto and to said vessel, her tackle, apparel and furniture and cargo in the sum of \$160,000.00."

It is clear that the word "property" as therein used was not intended to cover the cargo.

It is apparent from the first portion of the libel that it was not brought on behalf of the cargo owners,

and we think it equally clear that article 5 does not set forth the damages suffered by the cargo owners.

If, instead of filing the libel in cause No. 1052 in the name of the bailee of the cargo, it was filed in the name of the cargo owners, appellant's objection would not for one minute be considered. Everyone would concede the cargo owners that privilege. The mere fact that the same libelant in two different capacities has appeared in two suits wherein it attempts to recover damages for two separate interests should not change the result.

Another reason for an independent libel on behalf of the cargo owners is made manifest when it is recalled that the Strathalbyn Steamship Company, Limited, as owner of the "Strathalbyn", is taking a position entirely opposed to the interest of the cargo owners. It denies all liability for the losses suffered by them. The necessity for independent action is therefore quite apparent.

The filing of the second libel has made a difference to appellant of one-half of the costs in favor of the cargo owners, to wit, \$26. Because the court has awarded that sum to the cargo owners and against the appellant, and because they were compelled to put up another bond for the release of the "Virginian", appellant urges that the learned District Court has abused its discretion in awarding the cargo owners interest on their damages.

The question of interest on the damages, we submit, does not here arise, because even if the second libel

had not been filed, and damages were awarded to the cargo owners or to the Strathalbyn Steamship Company, Limited, as bailee of the cargo under the allegations of the libel in cause No. 1036, interest on those damages would have been decreed. In other words, the court, in the exercise of its discretion, would have properly awarded the cargo owners interest on their damages whether or not the second libel was filed.

The requirement of a second bond for the release of the "Virginian" was necessary. The bailee of the cargo, of course, was not in a position to judge the value of the cargo nor the extent of the damages. It was bound to obtain adequate security for the cargo owners, having in view all of the possible damages which might result from a forced sale of the cargo, or from its transportation after being wet by salt water, on a long voyage through changing climatic conditions. Furthermore, if it thought that the bond was excessive, the remedy of the appellant would have been to ask that it be reduced.

The Alaska, 23 Fed. 597, at p. 615.

The lower court awarded interest on the damages suffered by the cargo owners and such action does not appear to have been an abuse of discretion. And under the familiar rule, announced so frequently by this court, such an award should not be reversed unless there be a manifest abuse of discretion in the action of the lower court.

The innocent cargo owners are entitled to their damages in full, without regard to the division of

costs as between the two vessels in fault, and the decree awarding the cargo owners interest and costs should, therefore, be affirmed.

In conclusion, we submit that the innocent cargo owners and their underwriters are entitled to their full damages from one or both of the vessels.

As said by the Supreme Court, in speaking of the cargo owner in cases of collision:

“He ought not to suffer loss by the desire of the court to do justice between the wrong-doers. In short, the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties.”

The Alabama and The Gamecock, supra.

We respectfully submit, therefore, that the decree be, in all respects, affirmed.

Dated, San Francisco,

March 4, 1916.

Respectfully submitted,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN.

Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
a corporation.

Appellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN.

Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation, as bailee of a cargo of lumber
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cargo.

Appellee and Cross-Appellee,

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation.

Appellee and Cross-Appellant.

In Admiralty

No. 2728.

Filed

MAR 20 1916

F. D. Monckton,

Clerk

REPLY BRIEF OF CROSS-APPELLANT AND APPELLEE,
STRATHALBYN STEAMSHIP COMPANY, LTD., TO BRIEF
OF APPELLEE, STRATHALBYN STEAMSHIP
COMPANY, LTD., AS BAILEE OF THE
CARGO OF THE STRATHALBYN.

HUFFER & HAYDEN,
W. H. HAYDEN,
F. A. HUFFER,

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albyn Steamship Company, Ltd.
Tacoma, Washington.*

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN,
Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation,
Appellee and Cross-Appellant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a corporation, owner and claimant of the
Steamship VIRGINIAN,
Appellant and Cross-Appellee,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation, as bailee of a cargo of lumber
consisting of 3,563,011 feet, and for the use
and benefit of the owners and insurers of said
cargo,

Appellee and Cross-Appellee,

STRATHALBYN STEAMSHIP COMPANY, LTD.,
a corporation,
Appellee and Cross-Appellant.

In Admiralty
No. 2728.

REPLY BRIEF OF CROSS-APPELLANT AND APPELLEE,
STRATHALBYN STEAMSHIP COMPANY, LTD., TO BRIEF
OF APPELLEE, STRATHALBYN STEAMSHIP
COMPANY, LTD., AS BAILEE OF THE
CARGO OF THE STRATHALBYN.

As the cargo owner's brief was served but a few minutes before the argument, and request was made to the court for leave to file a reply brief thereto, the Strathalbyn Steamship Company, Ltd., as cross-

appellant, now submits the following in answer to the cargo owner's contentions:

For the purpose of avoiding the express provisions of the charter party between the American Trading Company and the owners of the Strathalbyn, the Strathalbyn Steamship Company, Ltd., as bailee of the cargo, on page 3, makes the following statement as the basis of its argument to secure relief from the express provisions of the charter party exempting the steamship from liability for loss by collision:

"The cargo owners were not parties to it."

A stipulation is on file in this case, dated October 28, 1915, between the cross-appellant and the appellee as bailee of the cargo, setting forth the charter party and the bill of lading. The bill of lading reads:

"Shipped in good order and condition by the American Trading Company (Pacific Coast) on board the British steamer called the Strathalbyn," etc., "cargo to be delivered" * * *
 * (* * "collisions excepted) to the order of the American Trading Company" * * *
 "they paying freight" * * * "and other conditions as per charter party."

As this brief is being written in Tacoma and the original stipulation and the bills of lading are on file in the court in San Francisco and we have not a copy of the bill of lading attached to the stipulation

above referred to, the above quotation is taken from a copy of the bill of lading furnished, shortly after the collision, by the American Trading Company, at the request of the Strathalbyn Steamship Company, Ltd. If there is any difference in the bill of lading on file and the copy we have quoted from, we make the above statement so that the court may understand the reason therefor, but we are as confident as we can be, without comparing the two bills of lading, that the above quotation is in accordance with the bill of lading attached to the stipulation above referred to. Note that in the bill of lading the American Trading Company is the consignor and in the charter party is the charterer.

The statement that "The cargo owners were not parties to it" (the charter party) is, therefore, inadvertently or inaccurately made, and, as all of the bailee's argument is hinged on the premise that the cargo owners were not parties to the charter party, and, as this premise is not in accordance with the facts, its argument is not pertinent to the facts involved in this case. The cargo owners are, therefore, not "innocent cargo owners," i. e., cargo owners disassociated from the terms of the charter party through the bills of lading. As the bill of lading refers to the charter party, and as the ship was a private carrier for the American Trading Company, and as the American Trading Company, the charterers, were the consignors and consignees

of the cargo, if there are any other persons owning this cargo, such cargo owners and their insurers succeeded only to the rights of the American Trading Company, and became a party to the exemption from loss by collision as fully as was the American Trading Company. As the bailee's whole argument is based on either the proposition that the cargo owners are innocent cargo owners—that is, not parties to the contract, through assignment or otherwise, exempting the Strathalbyn from liability by collision—or are protected as cargo owners by the Harter Act, and as it appears that the cargo owners were or are the American Trading Company, who entered into the contract of charter party and bill of lading, or its assigns, and as it appears that the ship was a private carrier and not subject to the terms of the Harter Act, the argument based on both these propositions and supported by the authorities referred to is entirely aside from the point at issue, which point of issue is that the company shipping the cargo was a party to the charter party and is, together with its successors by purchase under the bills of lading, therefore, bound by all its provisions, one of which exempts the Strathalbyn and owners from liability by reason of collision.

As the Strathalbyn is a private carrier and there is no objection to a private carrier exempting itself from liability for negligence, as was done in this case, then the contract relationship between the

parties should be enforced by the court, for it is a valid contract, and the court should see to it, in this consolidated cause, that the Strathalbyn has the benefit of the exemption, by only permitting such a decree to be entered as will prevent the Strathalbyn being required to pay any part of the loss to the cargo owner. Under the contract, the cargo owner chose to assume the risk of collision and apparently chose to protect itself from loss by reason of collision through insurance. The risk of collision assumed by the charterer and cargo owner entered into the consideration in fixing the freight rate prescribed in the charter, and the cargo owner should not now be allowed by any indirect method, or directly, to charge the Strathalbyn with any liability.

Under the law of Great Britain, in cases of collision for which both ships are in fault, the owners of cargo in one can recover only one-half their damages from the vessel colliding with the ship in which the cargo is being carried, and the right of the cargo owner to recover the other half of the damage is controlled by the charter party or bill of lading.

Carver, in his *Carriage by Sea* (5th Ed.) at page 922 *et seq.*, has the following:

“704. Where both vessels have been in fault in bringing about the collision, the rule is that the liability of the stranger ship, or those responsible for her management, is for one-half

only of the damage occasioned to the goods.

* * * And it is now clear that the fact that the collision was in part due to negligence of those in charge of the carrying ship does not stand in the way of a claim by the cargo owners against the other ship in fault. And at common law the right of the cargo owner would be to a full compensation. But by the rules of law administered in the Court of Admiralty, where both vessels are to blame, even though not in equal degrees, the whole loss sustained by their owners is apportioned equally between the two. Each party becomes liable to pay to the other one-half of the damage which he has sustained. And this rule has been extended to the claim of an owner of cargo in one of the vessels. He is allowed to claim for half his loss, and no more, against the other vessel. It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that, as a plaintiff, he does not stand in the same position as the owner of one of two delinquent ships; and if that were the sole ground upon which the owner of the ship would only recover one-half, it might well be that the owner of the cargo would recover the whole; but this is not exactly the view taken by the admiralty law. It endeavors, whether wisely or not I do not say, to administer more equitable justice, and, where both parties are delinquent, to give a moiety of the loss, or to divide the whole loss, it being impossible to ascertain the proportionate culpability. I apprehend that, carrying out this principle according to its practice, the Court of Admiralty would say: 'You, the innocent owner of a cargo, proceeding against one only of two delinquent ships, shall recover only a moiety of the damage, because

we can affix to the vessel proceeded against only a moiety of the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the other vessel, which we hold to be equally delinquent.' It may be true that this principle is not altogether reconcilable with the rules and practice of common law, and much might be said as to the equity of its operation and effect; but still I think that this resolution of the question is not conformable to the case of *Hay v. Le Neve*, and other cases; and therefore my decree must be that the plaintiffs do recover a moiety of the damage only. The *Milan*, 31 L. J. Adm. at page 112. By section 25, subsec. 9, of the Judicature Act, 1873, it is provided that, 'in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.' "

We only ask that the exemption from collision liability provided for in the contract be given force and effect, and that in fixing the rights of the charterer-cargo-owner under the charter party the admiralty rule as above stated be applied to the private carrier contract and that the rule as established in connection with public carriers be not injected into this case to effectually overcome the express contract of the *Strathalbyn's* owners and the charterer-cargo-owner.

On page 8 of the cargo's brief is this statement:

“If, therefore, the court should be of the opinion that the *Virginian* is not in fault, a decree, we submit, should be entered against the *Strathalbyn* awarding the cargo owners their full damages.”

This position is inconceivable. The *Strathalbyn* Steamship Company, Ltd., as bailee, sued the *Virginian*, and has never commenced suit against the owners of, nor has it libeled, the *Strathalbyn*. It would be rather odd to have a judgment against the *Strathalbyn* in favor of a libellant against the *Virginian*. No process was issued against the *Strathalbyn* or her owners pursuant to any prayer of the bailee, nor, at all, except by reason of the petition of the *Virginian* under the 59th Admiralty Rule, for the purpose of protecting the *Virginian* against an excess liability in case the *Virginian* and *Strathalbyn* were held in mutual fault. In an ordinary case of mutual fault, where the cargo carrying vessel is a public carrier, one vessel could recover against the other one-half of the whole loss, but not so the *Virginian* in this case, in view of the provision of the charter party exempting the *Strathalbyn*, as a private carrier, from any loss by reason of collision. The situation, therefore, places the cargo owner in a position where it cannot recover anything against the *Strathalbyn* in a direct suit against the *Strathalbyn*, and surely, by reason of the petition of the *Virginian*, which is filed solely for the purpose of protecting the *Virginian*, the

cargo owner cannot have a judgment against the Strathalbyn for any amount. We, therefore, respectfully submit that, under the pleadings in this case, it would be absolutely impossible to hold the Strathalbyn, should the court conclude that the Virginian was not at fault.

The District Court was of the view that the Strathalbyn was not liable at all to the owner of the cargo on the Strathalbyn, but was obliged to recoup the Virginian for half its loss, and the decree is so framed that the cargo owner cannot recover against the Strathalbyn any sum whatever, for the cargo owner has not asked in its pleadings to recover against the Strathalbyn any sum whatever. From this decree the cargo owner has not appealed. How can it then claim it is entitled to judgment against the Strathalbyn if the Virginian is held free from fault? The District Court also took the position that, regardless of the cargo owner's contract exempting the Strathalbyn from liability, the Strathalbyn was nevertheless liable for one-half of the cargo damage by the indirect process of allowing the Virginian to recoup one-half of the total cargo damage. We say that justice to all can be done and the contract provisions between the Strathalbyn and the charterer cargo owner carried out by giving the cargo owner judgment against the Virginian for only one-half its damage, without any right in the Virginian to recoup.

The appellee, bailee of the cargo, contends that the Harter Act exempts the carrier from liability to the same extent that the charter party exempts the carrier from liability, but the courts have uniformly held that the Harter Act is only applicable as between the cargo owner and the carrying ship and does not extend to exempt from liability for occurrences beyond the express provisions of the Harter Act. This is a condition imposed by implication of law—not by contract. In other words, the Harter Act, as between a common carrier and the cargo owner, creates a contract or agreement which cannot be modified by the parties. On the other hand, there is no limitation upon the right of a private carrier to contract with a cargo owner. In this case, as in the case of *The Maine*, the contract is a private one, and, being pleaded as a defense to the petition of the *Virginian* impleading the *Strathalbyn* and being pleaded as a defense and served upon the bailee of the cargo pursuant to Rule 59, we contend that the court should give force and effect to the contract and only charge the *Virginian*, if both are at fault, with one-half of the loss of the cargo, and exempt the *Strathalbyn* entirely from loss, and thereby carry out the express intention of the parties, and, at the same time, do no damage to the *Virginian* by requiring it to pay more than one-half of the loss, provided the *Virginian* is not held solely at fault by this court for the collision. Of course, if it is held solely at fault by this court

for the collision, then there can be no attempt made on the part of the *Virginian* to make the *Strathalbyn* pay any part of a loss from which the *Strathalbyn* has expressly exempted itself by its contract.

We respectfully submit that the following points are clear:

(1) That the cargo owner is making no claim against the *Strathalbyn* for any loss in its pleadings or proof;

(2) That it is perfectly lawful for the cargo owner and the *Strathalbyn*, as private carriers, to contract so that the *Strathalbyn* is relieved from all liability for loss by reason of collision, whether occasioned by negligence or otherwise, as has been done in this case;

(3) That if the *Virginian* and *Strathalbyn* are finally held both at fault, the cargo owner will be entitled to recover but one-half of its loss against the *Virginian*, without the right on the part of the *Virginian* to recoup against the *Strathalbyn* any portion of that one-half of its loss;

(4) That the appellee is in no position to ask that the *Strathalbyn* be held for the cargo damage under any circumstances, as it has not appealed from the decree of the District Court, which did not make the *Strathalbyn* liable for any cargo damage;

(5) That the case of *The Maine*, 161 Fed. 401,

is directly in point and adjusts the liabilities according to the contract of private carriers and distinguishes the rights of private carriers under an exemption from that of public carriers under the Harter Act, and applies the rule that the cargo owner can recover but one-half its damage from the colliding vessel and nothing from the carrying vessel.

We, therefore, respectfully submit that the decree should be modified, if the Virginian and Strathalbyn are both held at fault, to the extent of permitting the cargo owner to recover but half its loss against the Virginian, to prohibit the Virginian from recouping any part of the amount it has to pay to the cargo owner and to exempt the Strathalbyn Steamship Company, Ltd., from any loss on account of the cargo.

Respectfully submitted,

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poration, as bailee of a cargo of lumber consisting of
3,563,011 feet, and for the use and benefit of the owners
and insurers of said cargo,

Appellee.

APPELLANT'S PETITION FOR A REHEARING

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Appellee.

APPELLANT'S PETITION FOR A REHEARING

The Appellants herein respectfully petition for a rehearing of the above cause upon the following grounds:

1. That the Court has apparently overlooked appellant's contention that any error committed by the

Virginian was an error *in extremis* for which she cannot be held at fault.

2. That the Court in adopting the Lower Court's finding that the Virginian did not reverse until "less than a minute" before the collision has overlooked the fact that such finding was not only contrary to all the positive testimony on this point, but that it was based on indirect testimony, which when properly considered proved the Court's conclusion to be a physical impossibility.

3. That the Court in finding the Virginian at fault for proceeding on her course, has overlooked the uncontradicted testimony that her engines were stopped immediately after the Strathalbyn's first whistle.

4. That the Court in finding the Virginian at fault for not blowing a danger whistle has overlooked the requirements of Rule III of Art. 18 of the Inland Rules of Navigation and Rule I of the Pilot Rules for the Inland Waters of the Atlantic and Pacific Coast, which taken in conjunction with Rule IX of Art. 18 of the Inland Rules and Rule III of the Pilot Rules forbid the giving of any such whistles unless the approaching vessel is *in sight*.

5. That the Court has overlooked the fact shown by the undisputed testimony that the Strathalbyn had the Virginian in full sight at all times, knew her po-

sition and manoeuvres and that therefore the failure of the *Virginian* to blow a danger signal, if a fault, was not a contributing fault, especially as the *Virginian* had refused to answer previous passing signals.

6. That the Court has overlooked the fact that the primary causative fault of the *Strathalbyn* in not having sufficient visible lights was clearly established (and so found by this Court as well as the Lower Court) and that under the rule laid down by the Supreme Court of the United States in the *Victory*, 168 U. S., 410, the contributing fault on the part of *Virginian* must be clearly established and all doubts should be resolved in her favor.

ARGUMENT

This Court, after stating the facts as found by the Lower Court and apparently adopting the same, disposes of appellant's contentions without discussion as follows: "It seems too clear to require discussion that the *Virginian* was in fault in proceeding on her course and in not stopping and reversing her engines sooner than she did after hearing the signals of the *Strathalbyn*, and in not giving a danger signal."

Both the record and briefs in this case are lengthy, and appellants would not ordinarily ask this Court to reconsider the same. In the present case, however, all of the alleged faults found against the

Virginian are predicated upon a violation of one or more of the Articles of the Inland Rules of Navigation. In such a case we feel that this Court should clearly point out the proper construction of such rule or rules for the future guidance of navigators. It certainly cannot be said that the rules here involved are so clear and unambiguous as to admit of but one construction. This record abounds with testimony of expert navigators as to the proper construction and meaning of these rules, much of which testimony is in direct conflict. We feel that the proper construction of these rules is of vital importance to navigators and that we are justified in asking this Court to construe the same.

This Court finds the Virginian in fault "in proceeding on her course and in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn."

If it is meant by this language to charge the Virginian with fault in failing to change or alter her course after hearing the signals of the Strathalbyn, it seems to us that the Court has not fully considered the effect of Rule I of Article 18, and Pilot Rule 4, and certain decisions which should have controlling effect upon that situation. As we construe the rule, it would have been a fault for the Virginian to have changed or altered her course when the approaching vessel was not visible.

In the case of *The Umbria*, — U. S., —, the Court said:

“We think it would have been more prudent on the part of *The Iberia* not to have changed her course until the position and course of the approaching steamer had been definitely ascertained.”

In the case of *The Resolution*, 6 Asp. Rep. N. S., 363, the Court said:

“Altering the helm before the approaching vessel’s position was known was condemned as acting in the dark.”

In the case of *The Vindomova*, 6 Asp. Rep. N. S., 569, the House of Lords held substantially that until the position of the other vessel is definitely ascertained, a vessel is not justified in altering her course.

Rule 1 of Article 18 and Pilot Rule 4 require approaching vessels, when the passing signal is given, to change their course accordingly, but Rule 9 of Article 18 specifically provides that these whistle signals for vessels meeting, passing, or overtaking are never to be used except when steamers are in sight of each other, and the course and position of each can be determined by sight of the vessel or by sight of its signal lights. Under these decisions and these rules, it seems clear to us that the *Virginian* was not permitted to either alter her course or answer the signals of the *Strathalbyn*, as that vessel was not in sight.

This Court adopts, *in toto*, the findings of the Lower Court, and finds the *Virginian* at fault "in not stopping and reversing her engines sooner than she did after hearing the signals of the *Strathalbyn*. Neither the opinion handed down by this Court nor that handed down by the Court below attempts to accurately determine the time and distances involved in the various incidents occurring between the time the *Virginian* passed Pully Point and the time of the collision, and we would respectfully submit to the Court that a careful examination of the facts, as established in the record, will demonstrate that the *Virginian* was *in extremis* at the time she is alleged to have failed in the particulars mentioned, and also that no action taken by the *Virginian* under the circumstances as they actually existed, did contribute, or could possibly have contributed to the collision.

It is established without contradiction from any source that the *Virginian* passed Pully Point at 7:53 p. m., and that the *Virginian* and *Flyer* were abeam at that time. See testimony Captain Green, Master of the *Virginian* (Ap. p. 833, 847); McLeod, officer on watch on *Virginian* (Ap. p. 889); Duffy, pilot on *Virginian* (Ap. p. 1157). Burns, Master of *Flyer*, testifies that he passed the *Virginian* at Pully Point (Ap. p. 173). His time was about 7:55. Penfield, Master of the *Indianapolis*, passed the *Virginian* and *Flyer* at 7:54, just south of Pully Point. (Ap. p.

990). He passed Pully Point going north at about 7:55 (Ap. p. 983). We submit that this testimony establishes beyond question the fact that the *Virginian* and *Flyer* were abeam and passed Pully Point at 7:53, *Virginian's* time, or within a few seconds thereof.

We think it is equally well established that the collision occurred at about 7:59, *Virginian's* time. The entry on the engine room log of the *Virginian* states that she stopped reversing her engines at 7:59, which was immediately after the collision. Of course, this entry does not purport to be accurate to the second. It was made shortly after the collision and merely indicates that the time was nearer 7:59 than it was either 7:58 or 8 o'clock. McLeod, who was on watch at the time, states that the collision was just before 8 o'clock (Ap. p. 900). Shuri, the quartermaster at the wheel, gives the time as 7:59 by the *Virginian's* clock in the wheel house. He states that he noted and recorded the time at once. (Ap. p. 903.) Duffy, pilot, says the collision occurred between 7:59 and 8 o'clock (Ap. p. 1166). We earnestly insist, therefore, that the time of the collision is definitely fixed at approximately 7:59, and that the time between the passage at Pully Point by the *Flyer* and the *Virginian* and the collision was approximately 6 minutes.

The record also clearly establishes, and both the Court below and this Court have found that the *Flyer*

was making 14 to 14½ knots, the Virginian 11 knots, and the Strathalbyn slightly over 6 knots per hour. With these facts established, it is merely a mathematical proposition to demonstrate that the Virginian and Strathalbyn, at the time of the giving of the first signal by the Strathalbyn to the Virginian, were considerably less than half a mile apart, and that the time that elapsed between the first signal from the Strathalbyn to the Virginian and the collision did not exceed 1½ minutes.

One other fact as to the situation of the vessels is established by the testimony of all the witnesses, and that is that the Strathalbyn and Flyer were abeam at the time the Strathalbyn gave her first signal to the Virginian. This fact was established by the testimony of Beecher, pilot of the Strathalbyn (Ap. p. 222), and Purdy, first officer of the Strathalbyn, who says that the Flyer was on the Strathalbyn's port quarter at the time (Ap. p. 288); and Burns, master of the Flyer (Ap. p. ~~179~~); Decision Lower Court (Ap. p. ~~115~~).

The following calculation shows that the findings of the District Court as to distances and time, and which have been adopted by this Court, cannot possibly be correct:

The Virginian passed Pully Point and was passed by the Flyer at (Virginian's chart room clock).....7:53 P. M.

Adding thereto the several periods of time stated by the District Court as having elapsed before the collision, we find:

1st:	Time after Flyer passed Virginian off Pully Point until Flyer sig- naled the Strathalbyn.....	5 min.
2nd:	Time after Flyer sig- naled Strathalbyn until Strathalbyn signale d Virginian (Flyer and Strathalbyn having cov- ered the distance be- tween the two of one mile during that time)....	3 min.
3rd:	Time after Strathal- byn's signal to Virginian until collision	3 min.
	Total	11 min.

Would bring the time of collision at.....8:04 P. M.
or approximately 5 minutes later than the
collision actually occurred. In other words,
the Court has practically doubled the time
that elapsed between the time the Vir-
ginian passed Pully Point and the collision.

The Court stated that within 5 minutes or less
after passing the Virginian, the Flyer was signalled by
the Strathalbyn; that the Strathalbyn and Flyer were
at this time one mile or less apart; and that the Strath-
albyn, when on the bow or abeam of the Flyer, first
signalled to the Virginian. With these factors de-
termined, the distance between the Strathalbyn and
the Virginian, at the time the Strathalbyn gave her
first signal to the Virginian, is easily demonstrated.

The Flyer making.....14 knots per hour,
 The Virginian making.....11 knots per hour,

Difference 3 knots per hour.

In five minutes, or 1-12 hour, the Flyer would
 draw ahead of the Virginian 1-12 of 3
 knots, or $\frac{1}{4}$ knot.

Strathalbyn and Flyer 1 mile apart:

Flyer at14 knots per hour

Strathalbyn at 6 knots per hour

Were approach-
 ing at20 knots per hour,
 and would cover 1 mile every 3 minutes. With
 the difference in speed between the Flyer and
 Virginian, as above stated, of 3 knots per
 hour, in 3 minutes the Flyer would draw
 ahead of the Virginian.....3-20 knot

So that the distance between the Strathalbyn,
 which was abeam of the Flyer, and the Vir-
 ginian, when the first signal was given to the
 Virginian was 2,416 feet, or.....8-20 knot

The Trial Court also said that the collision did
 not occur for three or four minutes after the first
 whistle of the Strathalbyn to the Virginian, during
 which time the Strathalbyn blew two passing and a
 danger signal, and we understand this Court to adopt
 these conclusions of the Lower Court. This finding
 was, of course, based upon the testimony of the
 Strathalbyn's witnesses as to these passing signals.
 That testimony is as follows:

- 1st whistle: Strathalbyn signalled Virginian when abeam of Flyer.
- 2nd whistle: After waiting a minute and receiving no answer, second signal was blown, and engines stopped. } 1 minute under full speed.
- 3rd whistle: After waiting a minute, the Virginian not answering, and her red light being still hidden, another blast was blown. } 1 minute under stopped engines.
- A minute and a half later Strathalbyn reversed her engines. } 1½ min. under stopped engines.
- Danger Signal: The Virginian still coming on and giving no signal, no change in course being observable, and collision being imminent, the Strathalbyn gave the danger signal, which was immediately answered by the Virginian's three blasts and within less than a minute boats came into collision. } 1 minute under reversed engine.

4½ minutes.

In respect to the Virginian, the Court has found as a fault of the Virginian that her engines were not reversed until less than a minute before the collision. Applying these conditions to the respective speeds of each steamer for the period of 4 minutes, the following results are produced:

Strathalbyn:

1 minute under full speed.....	608 feet
2½ minutes under stopped engines (at full speed equal to 1,520 ft.).....	1,180 feet
1 minute under reversed engines, at one- half speed	304 feet

Distance Strathalbyn would progress..2,092 feet

Virginian:

3 minutes under stopped engines at full speed, 1,115 feet per minutes, allowing for lost momentum	2,500 feet
Less than 1 minute under reversed engines, say	300 feet

Minimum distance which two steamers
would progress within the time and
under the conditions found by the Court..4,892 feet

It seems, therefore, clearly apparent that the distance between the vessels being not exceeding 2,416 feet, as above shown, and that the vessels would, in the time found by the Court, cover 4,892 feet, the Court's finding of time elapsing between the first signal given by the Strathalbyn to the Virginian until the collision is erroneous and that the time between these occurrences could not have exceeded 1½ to 2 minutes.

Therefore, if these facts are established, to-wit: (1), that the Virginian and Flyer were abeam and passed Pully Point at 7:53; (2), that the collision occurred at or about 7:59; (3), that the speed of the Flyer was 14 to 14½ knots, the Virginian, 11 knots, the Strathalbyn, 6 knots plus; and (4) that the Strath-

albyn's first signal to the *Virginian* was when she was abeam of the *Flyer*, it seems clearly to follow that the vessels were *in extremis* from that time on and that no action could have been taken by the *Virginian* that would have averted this collision.

It should also be noted that there is no dispute over the fact that the *Virginian* stopped her engines immediately after the first signal from the *Strathalbyn*, and that the officers in charge of her navigation would require some appreciable time in their endeavors to locate the approaching vessel.

The conclusion deduced above, that the vessels were not to exceed $1\frac{1}{2}$ to 2 minutes apart when the first signal was given to the *Virginian* by the *Strathalbyn*, is also corroborated by certain of the testimony of the officers in charge of the *Strathalbyn*. The collision occurred practically on the direct course of the *Virginian*, and head on, or nearly so. The officers navigating the *Strathalbyn* testified that when they give their signal to the *Flyer*, they ported their helm. They further testified that when they gave the first signal to the *Virginian*, they again ported their helm, and after waiting about a minute, and receiving no response, they gave the second signal and again ported their helm. If the time elapsing between the giving of the first signal and the time of the collision was as correct as that found by the Court, it is man-

ifest that the Strathalbyn, having ported her helm, would have progressed so far to her own starboard as to have been beyond the path of the Virginian. Either the statement of the officers of the Strathalbyn, that they ported their helm at the various times stated by them, is no correct, or the time elapsing between such action and the collision was too short to enable the vessel to make any material progress on her new course to starboard. Of course, if the Strathalbyn, after giving the signal that she was porting her helm, failed to do so, that was a clear error in navigation. This Court finds that there was no fault in the navigation of the Strathalbyn save in respect to her lights. Inasmuch as the collision was head on, or nearly so, and the Virginian had proceeded on her course without changing her helm, it follows that the reason the Strathalbyn had not progressed far enough to starboard to get beyond the path of the Virginian was the lack of time for her helm to take effect. The whole question of the alleged fault of the Virginian, in delaying the reversal of her engines, depends upon the distance between the Strathalbyn and the Virginian when the first signal was given to the Virginian by the Strathalbyn. It is not to be expected that the judgment of men as to distances on a dark night will either agree or be entirely accurate, nor will their statements of the time elapsing between two events be entirely reliable. The state-

ment of different witnesses, however, upon those points, is entitled to some consideration. Captain Burns, of the *Flyer*, testified that the *Virginian* was about $\frac{1}{8}$ of a mile astern at the time the *Strathalbyn* signalled the *Flyer* (Ap. p. 178); McLeod testified that two minutes after the *Flyer* passed the *Virginian*, he heard one whistle ahead, which was answered by the *Flyer* (Ap. p. 891); Captain Duffy testified that the *Flyer* was 300 or 400 feet ahead of the *Virginian* when he heard a whistle from ahead, which was answered by the *Flyer* (Ap. p. 1158); Captain Green, of the *Virginian*, testified that he came on the bridge immediately after the first whistle of the *Strathalbyn* to the *Virginian*, and the *Flyer* was then about 1,000 feet ahead of the *Virginian*.

Allowing for the inaccuracies to be expected in testimony of this sort, under the conditions existing, we submit that this testimony is not unduly at variance, and is sufficiently corroborated to establish that the approximate time between the passing of the *Virginian* and the *Flyer*, off Pully Point, and the time at which the signal was given by the *Strathalbyn* to the *Flyer*, was not to exceed 2 minutes.

Captain Burns further testified that the *Strathalbyn* was $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the *Flyer* when the *Strathalbyn* first signalled the *Flyer* (Ap. p. 174, 175). Captain Beecher, of the *Strathalbyn*, testified that the

Flyer was from $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the Strathalbyn when he signalled the Flyer, thus confirming Burns' estimate (Ap. p. 205, 222).

The known speed of the two vessels was approximately as follows:

Flyer,	14 $\frac{1}{2}$	knots per hour, or 1,469 ft. per min.
Virginian,	11	knots per hour, or 1,115 ft. per min.
Strathalbyn,	6	knots per hour, or 608 ft. per min.

Taking the time when the Flyer passed the Virginian, and when the Virginian was abeam Pully Point at 7:53, and the time between the Flyer passing the Virginian and the time the Strathalbyn signalled the Flyer as about 2 minutes, and the time between the Strathalbyn signalling the Flyer and the time she signalled the Virginian as about 2 minutes, it results that the Strathalbyn signalled the Virginian at about 7:57, or about 2 minutes before the collision. Under the established facts, we think that this time cannot be over $\frac{1}{2}$ minute out of the way, as the difference in speed between the Flyer and Virginian was 354 feet per minute, and in the 4 minutes elapsing between the passing of Pully Point and the giving of the signal by the Strathalbyn to the Virginian, the Flyer would gain 4×354 feet, or 1,416 feet, on the Virginian. The Strathalbyn being abeam of the Flyer at the time that signal was given, she was, therefore, only 1,416 feet distant from the Virginian. If the time which elapsed between the Flyer passing the Vir-

ginian and the time when the Strathalbyn (being then abeam of the Flyer) signalled the Virginian, was 5 minutes, then that signal must have been given at 7:58 (7:53 plus 5 minutes), or about one minute before the collision.

It is therefore established beyond any reasonable doubt that this collision occurred from one to one and one-half minutes after the Strathalbyn first signalled the Virginian, at which time the vessels were *in extremis*.

That this must be true is shown by the calculations below, which are dependent upon the time elapsing between the Flyer passing the Virginian off Pulley Point at 7:53 and the time the Strathalbyn blew her first signal to the Virginian—it being established that the collision occurred at 7:59 (between 7:58½ and 7:59½) by the Virginian's time.

		Time signal given.	Length time before collision.	Distance between Virginian and Strathalbyn when signal given.
If 1	min.	.....7:54	5 min.	354 feet
" 2	"	.....7:55	4 "	708 "
" 3	"	.....7:56	3 "	1,062 "
" 3½	"	.....7:56½	2½ "	1,239 "
" 4	"	.....7:57	2 "	1,416 "
" 4½	"	.....7:57½	1½ "	1,593 "
" 5	"	.....7:58	1 "	1,770 "

In other words, if Strathalbyn signalled the Virginian at 7:54, the Flyer was at this time abeam of Strathalbyn and only 354 feet (1 minute in time) past Virginian and therefore Strathalbyn would have been

only 354 feet distant from *Virginian*. This was five minutes prior to collision. As *Virginian* and *Strathalbyn* were approaching each other at combined speed of 1,723 feet per minute (1,115 feet per minute *Virginian*'s speed and 608 feet per minute *Strathalbyn*'s speed) they would have collided in a fraction of a minute despite any possible movement of their engines. This result is manifestly impossible. It is likewise impossible, from same calculations, that such signal could have been given at 7:55, 7:56 or 7:56½. This first signal of the *Strathalbyn* to the *Virginian* must therefore have been given at some time between 7:57 and 7:57½ when the vessels were from 1,400 to 1,600 feet apart. It will be remembered that up to the time this first signal was given by the *Strathalbyn* that these vessels were approaching each other at full speed (1,723 feet per minute, or 29 feet per second) and after allowing for all possible reduction in speed obtainable by reversing engines (the *Strathalbyn* does not claim to have stopped her engines until her second whistle to *Virginian*), the vessels would come together if:

- 1,062 feet distant in about $\frac{3}{4}$ of a minute,
- 1,239 feet distant in less than 1 minute,
- 1,416 feet distant in about 1 minute,
- 1,593 feet distant in about 1½ minutes.

It was therefore impossible for these vessels to have retarded their engines so as to have avoided a collision in any of the above situations.

Keeping in mind that both vessels were proceeding at full speed up to the time this first signal was given to the *Virginian* by the *Strathalbyn*, and that they were approaching each other at the rate of 1,723 feet per minute (*Virginian* 1,115 feet per minute, *Strathalbyn* 608 feet per minute), or 29 feet per second, and allowing the officers navigating the *Virginian* some appreciable time for searching the waters ahead in order to discover the vessel signalling, it is apparent that there was no time when the *Virginian* could be charged with the fault in delaying to reverse her engines, and that such a reversal at any time when she could have been expected to reverse would not have avoided the collision.

In *The Bluejacket*, 144 U. S. 371, it was held that when the danger of collision became apparent $2\frac{1}{2}$ minutes before the collision, the vessels were to be considered *in extremis*.

In *The Delaware*, 161 U. S. 459, it was held that the whistle given when the vessels were about $\frac{1}{8}$ of a mile apart, was given too late to put the other vessel in fault for failure to answer. Many other cases bearing upon this situation are given in the brief of appellant, at page 122 et. seq.

We have ventured to ask the Court to re-examine the facts in this case because of the importance of the case to the parties involved, and also because the

rules of navigation are necessarily involved in the decision. It is a conceded fact, so found by this Court and the Trial Court, that the Strathalbyn's lights were dim and obscured from ahead, so that they could not be seen from the deck of the *Virginian*, notwithstanding diligent efforts were made by the officers of the *Virginian* to locate the vessel. This was, of course, a flagrant and glaring fault on the part of the Strathalbyn and is the primary cause of this collision. It is well settled that where one vessel is guilty of a glaring fault sufficient of itself to cause a collision, the other vessel will not be held for a division of the damages unless its fault is clearly established. Whether there was any fault on the part of the *Virginian* or not, under the theory of the decision of both the Trial Court and of this Court, depends upon what occurred between the time the Strathalbyn gave its first signal to the *Virginian* and the collision, and on the time elapsing between those two events. The Court below, whose findings have been adopted by this Court without discussion, apparently did not attempt to fix this time with any degree of accuracy, but used general terms. It was stated that the time elapsing between the *Flyer* passing the *Virginian* and the giving of the signal to the *Flyer* by the Strathalbyn was "about five minutes," and the time elapsing between the signal to the *Flyer* and the giving of the signal to the *Virginian* as "about three minutes," and the time elapsing be-

tween that event and the collision as "about three minutes."

We earnestly insist that the record furnishes sufficient data to fix these times with a much greater degree of accuracy than was done by the Trial Court, and that the question of fault on the part of the *Virginian* in delaying the reversal of her engines depends entirely upon the fixing of that time with some degree of accuracy. If, as we understand, the time elapsing between the giving of the signal to the *Virginian* by the *Strathalbyn* and the collision was not to exceed $1\frac{1}{2}$ to 2 minutes, it would seem clear, under the authorities, that the *Virginian* cannot be charged with any fault with respect to a delay in reversing her engines. It is conceded that her engines were stopped immediately upon hearing the first signal, her officers diligently endeavored to locate the vessel giving that signal and they were entitled to a reasonable time in that endeavor. It seems to us to be an exceedingly harsh finding against the *Virginian* to charge her with contributing fault in the failure to make that search and reach the conclusion that there was imminent danger of immediate collision and requiring her to immediately reverse her engines in time to avoid a collision brought about by the flagrant fault of the other vessel, and this conclusion is emphasized by the admitted fact that the *Strathalbyn* at all times had full view of the *Virginian* and was in a position to deter-

mine whether there was danger of a collision, and gave no danger signal until the collision was absolutely unavoidable.

The officers of the *Virginian* knew that the *Strathalbyn* could see the *Virginian*, and knew her course and direction, and therefore were in position to determine whether there was danger of a collision, and they reasonably had a right to assume that there was no imminent danger of a collision so long as the *Strathalbyn* gave no danger signal.

This Court also finds the *Virginian* at fault "in not giving a danger signal." This question was discussed in appellant's brief, beginning on page 126. We are not able, at this time, to add any force to the argument there presented. It involves a construction of the rules of navigation. It has seemed to us that those rules prohibited a vessel giving the danger signal when the other vessel is not in sight, and this is the construction given to the rules by the navigating officers of the *Virginian* and by Captain Sprague and other experienced navigators who were examined as witnesses in this case. If that construction of the rules is erroneous, it is, of course, important that this error prevailing among navigators should be corrected, so that in the future navigating officers will clearly understand that the danger signal required by Rule 3 of Article 8 must be given even though the approach-

ing vessel cannot be seen, notwithstanding the provision of Rule 9 of Article 18, which provides that "the whistle signals provided in the rules under this article for steam vessels meeting, passing or overtaking, are never to be used except when steamers are in sight of each other and the course and position of each can be determined in the day time by the sight of the vessel itself, or by night by seeing its signal lights."

With respect to the *Strathalbyn*, this Court finds that "no fault can be found with her navigation or her manoeuvres." It is a conceded fact that the *Strathalbyn* did not give the danger signal until the collision was so imminent that no possible measure could avoid it. If the *Strathalbyn* was guilty of no fault in thus delaying to give the danger signal until it could have accomplished no purpose, notwithstanding the admitted fact that her officers could see the *Virginian* at all times, and knew her course and direction and proximity to the *Strathalbyn*, it seems inconsistent to charge the *Virginian* with the fault in not giving the danger signal when it is admitted that she could not see the *Strathalbyn* because of the latter's obstructed lights and had no means of determining her course or direction or exact position, nor whether a collision was imminent or not.

We most respectfully urge the Court to re-ex-

amine these questions, feeling confident that such re-examination will result in clearing the Virginian of the faults attributed to her by the decision handed down by this Court.

In closing, we call attention to the fact that the copy of the opinion of this Court, furnished us by the Clerk, recites that this case was heard before Judges Gilbert, Ross and Hunt. We think that your records will show that the case was argued before Judges Gilbert, Morrow and Hunt.

Respectfully submitted,

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CARROLL B. GRAVES,
F. T. MERRITT,
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Proctors for Appellant.

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship
"Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
(a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship
"Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR A REHEARING.

WILLIAM DENMAN,
DENMAN AND ARNOLD,

Of Counsel, Clerk for

Filed this.....*day of July, 1916.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
(a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

SUPPLEMENTAL BRIEF

IN SUPPORT OF PETITION FOR A REHEARING.

The owners of the *Virginian* further urge that a rehearing be granted in this case because it appears from the face of the opinion itself;—

1. That, in finding the *Virginian* at fault, the judgment is based on arbitrary standards of navigation fixed by itself after the event, and has failed to recognize that in such navigation the *Virginian* was bound by the statutory rules (Inland Rules) as prescribed by Congress, regarding which this court has stated:

“The purpose of the statutory rule is to insure the highest degree of safety, and strict obedience to that rule construed precisely as it reads will eliminate accidents.” * * *

The Aurelia, 183 Fed. 341.

2. That in determining the *Virginian* was in fault for not having sooner stopped and reversed, the court has failed to recognize the established rule that the *Virginian* was entitled to rely upon the assumption that the rules were being observed by the other vessel and was neither required nor permitted without positive knowledge to act upon any assumption that the navigation of the approaching vessel was in entire disregard of the statutory requirements.

“Masters are bound to obey the rules and entitled to *rely on the assumption that they will be obeyed* and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules. *The Oregon*, 18 Howard 570.”

Belden v. Chase, 150 U. S. 674.

3. That in holding the *Virginian* at fault for not having sooner stopped and reversed, the court has placed upon the *Virginian* as a positive obligation a burden and duty not prescribed by the rules, and not re-

quired except in situations of immediate and known danger.

“The application of Rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in the *Oregon*, 15 Sup. Ct. Rep. 804:

“ ‘Exceptions to the rule are to be admitted with great caution and only when imperatively required by special situations of the case.’

“It follows that under all ordinary circumstances a vessel discharged her full duty and obligations to another by a faithful and literal observance of these rules. In *Marsden’s Collisions at Sea*, 6th Ed. p. 465, it is said:

“ ‘But Article 27 applies only to cases where there is immediate danger *perfectly clear*, and the departure from the rules must be no more than is necessary.’

“*Yang-Tsze Insurance Association, etc. v. Furness Withy Ltd.*, 218 Fed. 815.”

4. That in determining the *Virginian* was at fault for not having earlier given a danger signal, the court has failed to apply its decision in *The Aurelia*, *supra*, that the statutory rules are to be construed precisely as they read.

In Article 18 (which contains the provisions for the so-called danger signal) Rule 9, forming the last paragraph of that Article, it distinctly states:

“The whistle signals provided in the Rules under this Article for steam vessels meeting, passing or overtaking are never to be used except while steamers are in sight of each other.”

These rules are intended for the guidance and control of those who navigate vessels, a class of men not skilled in analyzing and interpreting vague and involved in-

structions. Although the rule may possibly be susceptible of the interpretation put upon it by the learned District Judge, it certainly does not convey that meaning to the mind of the ordinary reader, as is shown by the testimony of Captain Sprague and other experienced navigators who were examined in this case. The interpretation of this rule by the court for the future guidance of navigators is, therefore, vitally important in the interests of humanity.

5. That in holding the *Virginian* at fault the court has overlooked the fact that the primary causative fault was that of the *Strathalbyn* in her complete failure to comply with the statutory requirements as to lights to be carried, as provided in Article 2, Rules (a), (b) and (c), and has totally disregarded the clearly established rule as laid down by the Supreme Court of the United States in *The Victory*, 168 U. S. 410, that under such conditions the contributing fault on the part of the *Virginian* must be clearly established and all doubts should be resolved in her favor.

6. That the court has apparently overlooked appellant's contention that any error if committed by the *Virginian* was an error in extremis for which she can not be held at fault. (*The Blue Jacket*, 144 U. S. 371; *The Delaware*, 161 U. S. 459.)

Argument.

This court has recited and apparently accepted the same facts as found by the lower court. Substantially these facts are as follows:

The steamer Strathalbyn, proceeding northward from Tacoma with her sidelights in a grossly inefficient condition and in nowise complying with Article 2, Rules (b) and (c) of the statutory requirements, and with such inefficient side lights further obscured (by stanchions used in the loading of deck cargo) to such an extent that they were not visible to a vessel approaching from directly ahead, and in entire disregard and contrary to the requirements of Article 2, Rules (b) and (c) as follows:

“So fixed as to throw the light from right ahead to two points abaft the beam and of such a character as to be visible at a distance of at least two miles;”

and further, with her masthead light in a grossly dim and inefficient condition and in gross disregard of the requirements of Article 2, Rule (a):

“A steam vessel when under way shall carry on or in front of the foremast * * * a bright white light so constructed * * * and of such a character as to be visible at a distance of at least five miles”;

sighted two steamers, the Flyer and the Virginian, approaching on opposite courses to her own. The Flyer was making 14 knots an hour, the Virginian 11 knots and the Strathalbyn 6 knots plus. The Flyer overhauled, signaled and passed the Virginian about 200 yards to starboard. The Strathalbyn heard the passing signals exchanged. About five minutes later (at which time the Strathalbyn and the Flyer were not exceeding one mile apart), the Strathalbyn blew one whistle to the Flyer, which was answered by the latter, the vessels

passing port to port. The Virginian heard these passing signals, but her officers were unable to locate the lights of the Strathalbyn. When abeam of the Flyer, the Strathalbyn blew one whistle to the Virginian as a signal to pass port to port. The pilot and third mate of the Virginian on the bridge and the lookout heard the whistle, and assuming that it was a whistle intended for the Virginian diligent effort was made to locate the vessel giving the signal, but they were unable to see any light or make out the approaching vessel. The engines of the Virginian were stopped, and upon hearing a second signal blast of the approaching vessel, but being still unable to see any lights, it is testified that the engines of the Virginian were reversed and that about a minute after reversing the Virginian heard the danger signal from the approaching vessel and gave three whistles to signify that his engines were going full speed astern. Less than a minute thereafter the vessels came into collision.

On this state of facts, and on the findings of the court that the lights of the Strathalbyn were in fact inefficient and obscured and not in compliance with the regulations, it is clearly apparent that the primary and causative fault for the collision was in the failure of the Strathalbyn to exhibit the character of lights as required by Article 2, Rule (a), (b) and (c), and so placed as required by this Article that by means of same her position would be made known to approaching vessels.

“The Royal Arch was improperly navigated, in that she did not have her regulation side-lights, and especially her green light, properly and brightly

burning, and for that reason she was the sole culpable cause of the collision. * * * It was the duty of the *Nellie Flloyd* to avoid the *Royal Arch*, but she was relieved from such duty by the failure of the *Royal Arch* to exhibit any light which those on the *Nellie Flloyd* could see before the collision; and their ignorance of the course of the *Royal Arch*, until it was too late for the *Nellie Flloyd* to do anything to avoid the collision, was excusable and was produced by such fault of the *Royal Arch*.

The Royal Arch, 22 Fed. 457.

“The want of a red light was primarily the whole cause of the collision. The other vessel was deceived and misled by this failure to show that light.

The Mary Lord, 26 Fed. 862.

“The purpose of lights is to be seen; if they do not fulfill that office to ordinary observation the vessel must be held at fault.

The Amboy, 22 Fed. 555.

“The *Carib* (sailing vessel) was grossly in fault for so arranging her lights and sails that upon occasions such as this there would be a considerable field of obscuration on one or both sides of her stem. * * * The faults of the *Carib* being thus primary, obvious and inexcusable, the evidence to establish fault on the part of the *Iberia* (steamer) must be clear and convincing in order to make out a case for apportionment.

The Iberia, 123 Fed. 865. (Circuit Court of Appeals.)”

It is further manifest under the established rules as laid down in the above cases that to establish a fault on the part of the *Virginian* it must be clearly shown that that vessel was guilty of a breach of violation of one or more of the Rules of the Road, and that with positive knowledge of an impending and immediate

danger those in charge of her navigation failed to act upon such knowledge.

The only information in possession of those in charge of the navigation of the *Virginian* was that a vessel had exchanged a one-blast signal with the *Flyer*, which was ahead of them, and that a further signal of one blast had been blown by such vessel.

Under the Inland Rules, Article 18, a one blast signal may indicate one of the following conditions:

First. The desire of an overtaking vessel to pass on the starboard side of an overtaken vessel.

Second. As between vessels approaching on opposite courses it indicates that the positions of the vessels in relation to each other are such that a port to port passing is the proper maneuver, and a desire to so pass.

Under Article 18, to make a port to port passing a proper maneuver the vessels must be meeting head and head, or nearly so, or their courses must be so far on the port of each other that they will pass clear. This Article distinctly provides:

“But if the courses of such vessels are so far on the starboard of each other so as not to be considered as to be meeting head and head”

a signal of two blasts and a starboard to starboard passing is required.

What, then, was the *Virginian* to understand from the one blast signal?

She could understand that a vessel ahead was asking permission to pass another vessel, and such an understanding would be quite justified in the absence of

lights. Although unable to account for the absence of lights or to locate the signalling vessel, but assuming either properly or improperly that this one blast signal was probably intended for themselves and coming from a vessel approaching on opposite courses and desiring to pass port to port, what further information was the Virginian entitled to draw from the one blast signal?

She was certainly entitled and bound to assume that the signalling vessel was obeying the collision regulations (*Belden v. Chase*, supra) and that her signal properly indicated the situation that the vessels were either on courses which would carry them clear port to port, or were approaching head and head or nearly so, in either of which situations, if the signal was given timely and the approaching vessel, as indicated by her signal she was doing, altered her course for a port to port passing, no danger of collision could be anticipated by the Virginian, especially when by stopping her engines, as she did, the approaching vessel would be given further time in which to maneuver as indicated.

Under Article 18 (Inland Rules) the signal of one blast as between vessels approaching on opposite courses can only indicate one or the other of these positions. It is therefore manifest that the hearing of a signal of one blast ahead, even though unable to locate the vessel so signalling, could not indicate to the Virginian a known and positive danger of collision, which would put upon her the burden of giving the danger signal. On the contrary, such signals indicated that the approaching vessel with full knowledge of the po-

sition and course of the *Virginian* had elected as a safe maneuver a port to port passing, and which the *Virginian* in the absence of knowledge of danger could only assume was a safe one. The *Virginian* was, therefore, fully justified, even in the absence of an ability to locate the approaching vessel to assume from the one blast signal the positions of the vessels to be such that they would pass clear.

Most certainly if any danger of collision existed, such danger was fully known to those in charge of the navigation of the *Strathalbyn*, and was not known to the *Virginian*, and the *Strathalbyn*, being in a position to observe every movement of the *Virginian*, was under the duty and obligation, if danger existed, to so indicate by the proper signals. The *Virginian* was further entitled to rely upon such signals being given if danger existed.

It is therefore submitted that the *Virginian's* pilot acted under compulsion of the rules and decisions when he navigated his vessel up to the second whistle of the *Strathalbyn*, on the theory that the *Strathalbyn's* movements did not involve collision, rather than on the theory that there was danger *ab initio* requiring immediate reversing.

The Failure to Apply the Major and Minor Fault Rule.

Viewing the decision of this court from another angle: The court said:

“It seems too clear to require discussion that the *Virginian* was in fault in proceeding on her

course and in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn and in not giving a danger signal. As to the contributory fault of the Strathalbyn the evidence is conflicting."

It is submitted that the finding of the actions of the Virginian as the primary fault, and the failure of the Strathalbyn to carry proper lights as the contributing fault, is such an extreme misapplication of the law of causation as to be indisputable on a clear consideration of the facts involved.

The carrying of proper and efficient lights at night by which the position and course of a vessel is made known to other approaching vessels is one of the first and fundamental of the collision regulations. Its importance is shown by the fact that the first fourteen articles of the collision regulations are exclusively devoted to the subject of lights, describing in the most minute detail the character of lights to be used and how such lights are to be placed or located.

The failure to carry such proper lights as required by the Rules, or the obscuration of such lights, as has been found by the court to have existed in the case of the Strathalbyn, has been pointed out in the cases cited above to be, and is a major fault of the most gross and violent character.

When leaving Tacoma, the master and pilot of the Strathalbyn were charged with knowledge of the fact that practically every vessel to be met on their voyage up the Sound would come on a course directly opposite to their own and would probably be within the range in which their side lights were obscured. Every pass-

ing signal blown by the Strathalbyn would under such conditions be an invitation to a collision.

The fault of the Strathalbyn was not only primary in time, but primary in causative liability. It would initiate at the beginning of every maneuver a chain of misunderstandings which would be broken only when the vessels were in extremis, for it is only when a vessel coming head on is in the closest proximity to the Strathalbyn that she would become undeceived.

It is beyond our comprehension to understand how such a gross violation of one of the most important and fundamental Rules of the Road as this could under any theory of fact or law be termed a mere contributory fault. In view of the lower court's clear holding that the Strathalbyn's inefficient and obscured lights were the primary cause, the language of this court is still more inexplicable.

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such vessel should be resolved in its favor."

Alexandre v. Machan (The City of New York), 147 U. S. 72, at 85. (Cited with approval in the case of *The Ludvig Holberg*, 157 U. S. 60, at 71).

“As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymouthian must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish a fault on the part of the other.

“The recognized doctrine is thus stated by Mr. Justice Brown, in *The Umbria*, 166 U. S. 404, 409:

“‘Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in the *City of New York* (*Alexandre v. Machan*), 147 U. S. 72, 85 (37: 84, 90) and the *Ludvig Holberg*, 157 U. S. 60, 71 (39: 620, 624), that any doubts regarding the management of the other vessel, or the contribution of her fault, if any, to the collision, should be resolved in her favor.’”

The Victory-The Plymouthian, 168 U. S. 410, 430.

It is therefore submitted that in view of the recklessness and total disregard of the collision regulations with which the steamer *Strathalbyn* was being navigated, with her lights in a dim and inefficient condition, and with her side lights so obscured that they were not visible from directly ahead, it is, as stated by the Supreme Court in *The City of New York*, *supra*, no more than just that any reasonable doubt with regard to the propriety of the conduct of the *Virginian* should be resolved in her favor.

This supplemental brief is offered from one whose fresher connection with the litigation may enable him to see the effect of the opinions more clearly, and present these considerations from a different viewpoint.

We trust that it will be of real assistance to the court in preventing the permanent establishing of a principle in this circuit at least, which he feels is really dangerous to navigation.

Dated, San Francisco,
July 20, 1916.

Respectfully submitted,

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Of Counsel.

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
(a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

BRIEF SUBMITTED BY
SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST,
AMICUS CURIAE.

Filed

AUG 24 1916

F. D. Monckton,
Clerk.

SHIPOWNERS' ASSOCIATION OF THE
PACIFIC COAST,

By Oliver J. Olson,
Its President.

W. F. Sullivan,
Its Proctor.

Filed this.....day of August, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2728

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD.
(a corporation),

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY (a corporation), owner and claimant of Steamship "Virginian",

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD. (a corporation), as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,

Appellee.

BRIEF SUBMITTED BY
SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST,
AMICUS CURIAE.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The undersigned, the Shipowners' Association of the Pacific Coast, respectfully petition your Honorable Court that it grant the pending petition for rehearing in the above entitled cause for the following reasons of moment to all persons commanding vessels at night under the Rules of Navigation controlling in Inland Waters, to wit:

Because the opinion of this court, and the opinion of the District Court below, hold that the commander of a steamer on the waters of Puget Sound, on a dark night, with a moderate wind blowing towards him, who hears a whistle from a vessel ahead, which he believes to be approaching, but whose side lights are invisible, must navigate his vessel on the theory that the approaching vessel is within two miles—the distance within which Article 18, sec. 1, says they must be visible—and not rely upon the presumption of law that the whistle came from a greater distance than two miles, and that the side lights of the opposing vessel were properly not visible.

Because, restating the above proposition, this court has held that a commander in such a situation must disregard the presumption laid down in the cases later cited that the other vessel's manoeuvre and condition are presumed, even to the very jaws of the collision, to be proper, or will be made so, and must navi-

gate his vessel on the theory that the other vessel's manoeuvre is improper, and give signals and commands based on the assumption of this impropriety.

Because this court has placed on the innocent vessel the useless burden of blowing four whistles to tell a vessel, charged with knowledge of her invisible lights, that her lights are, in fact, invisible; whereas the guilty vessel should have the burden of blowing four blasts to advise the innocent vessel of her ignorance and hence the danger of collision, as soon as she receives no response to her passing signal.

Because this court, without considering the point, decides that where two steam vessels are "meeting" and the commander of one, not seeing the other but hearing her whistle and believing her approaching, though he cannot tell her course and position, must, nevertheless, blow the four blasts provided in Rule 3 of Article 18 of the Inland Rules, despite the positive command of Rule 9 that the signals for steam vessels so meeting "are never to be used except when the steamers are in sight of each other".

And, enforcing the last proposition, because, it seems to us that the court has failed to consider the reasons for prohibiting any of the signals provided in Article 18 (including four whistles) to be used by approaching steamers,

"except when the steamers are in sight of each other, and the course and position of each can be

determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights”.

Rule IX of Article 18 of the Inland Rules.

And because, as it seems to us, the court has failed to realize the confusion and the dangers which must necessarily arise if steamers are to be permitted to depart from these rules.

I.

The Virginian was compelled to assume that the Strathalbyn's lights were legally invisible until she positively knew to the contrary.

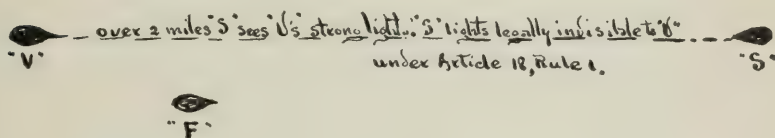
We are advised that the record in this case is long and voluminous and that much of the evidence is contradictory. We also understand how those without experience in the actual navigation of vessels can quite reasonably fail to take into consideration all of the varying elements which face a pilot at night, who must control his actions by the many rules prescribed by law to govern the many situations and combinations of circumstances which such navigation involves.

A reading of the opinions of both the lower and higher court here convinces us that they have established rules of navigation which will be seriously embarrassing to inland navigation in the future, and which contradict the rules as they have always been interpreted.

If one of us were on the bridge of the Virginian, approaching Vashon Island which has various lights

on shore indistinguishable from a masthead light* and saw the cabin lights of the Flyer, which has passed us and is 1500 feet ahead and on our starboard bow, and heard a whistle from ahead which is responded to by the Flyer, he would have three legal explanations for the invisibility of the unseen vessel's side lights, no one of which would call for either the danger signal or reversing on our part.

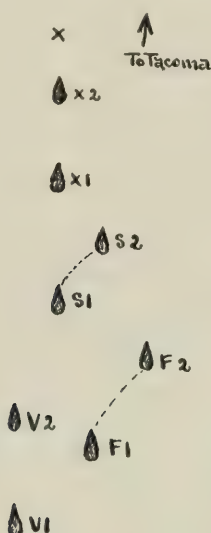
These three explanations are the following:



1. The invisible steamer coming from Tacoma, which we will call the Strathalbyn, has been watching the strong side lights of the Flyer and the Virginian for some time and has concluded that she has come near enough to exchange signals, whereas she is in fact over two miles distant and her side lights are legally invisible to us. They have already come within the range of visibility of the Flyer. This conclusion involves no wrong on the Strathalbyn's part as it is impossible to judge accurately the distance of observed side lights. They may be weaker lights nearer by or stronger lights farther off. Under Rule 9, Article 18, we are not permitted to respond with a passing signal because of her

* The opinion of the District Court quite properly holds that a pilot seeing all these lights cannot be compelled to make any assumption as to whether one is in fact a mast-head light.

invisibility; nor yet are we compelled to reverse because she is too far distant; nor yet are we compelled to enquire by four blasts (even if allowed to do so when the other vessel is invisible) because, being two miles distant, there is no immediate danger. We are certainly entitled to assume this proper explanation and to wait a second whistle before stopping her engines and a third before reversing.



2. The Strathalbyn, instead of approaching, is bound for Tacoma ahead of both the Virginian and the Flyer, and has also ahead of her another vessel (we will call the X), also bound for Tacoma. The Strathalbyn desires to overtake and pass the X and blows to her one whistle. The Flyer, a fast vessel, desires to overtake the Strathalbyn and blows one whistle and the Strathalbyn after a delay accepts the offer with one whistle. The Strathalbyn getting no reply from the invisible X blows a second signal to her. The Virginian,

not desiring to overtake these unseen vessels, stops her engines and on hearing another whistle reverses.



3. The Strathalbyn, bound for Tacoma ahead of the Virginian and Flyer and hence invisible to both, sees the X on her starboard bow bound on a crossing course to Des Moines, a port on the east shore of the Sound, and blows one whistle to the X under the starboard hand rule (Article 18, Rule 1). The Flyer, a fast vessel, thus discovering the Strathalbyn, blows one whistle to show she is overtaking the Strathalbyn. The Strathalbyn, after a delay, consents by a one whistle blast. We, on the Virginian, not desiring to run into a maneuver of unseen vessels, however proper, stop our engines and on hearing no response from X to the Strathalbyn and another whistle from X, reverse.

Out of each one of these three sets of maneuvers come the exact whistles and the same lights—or rather absence of lights—which were actually observed by the pilot of the Virginian. They are three situations not unlikely to occur on the voyage in question. Certainly there is nothing unusual in four vessels sailing on the

same route to Tacoma; and nothing impossible in three vessels sailing to Tacoma being crossed by a vessel sailing to Des Moines. In adopting the conclusion that any one of them was the situation actually before the *Virginian*, she would be assuming that the invisible vessels were acting within the statute. In concluding that any one of them was coming down on her with obscured side lights, she would be assuming that the opposing vessel was violating the law.

The *Virginian's* pilot guessed that the invisible steamer was approaching and thereupon was reasonably entitled under the rules to assume the first of these maneuvers. The confusion of mind to which he testifies so clearly at pages 1197, 1198, 1160 and 1182 of the apostles must have been in part caused by the subconscious knowledge that either of the other two might properly be transpiring. Stopping his vessel seems the very limit of cautious conduct in this situation.

Even if these three hypotheses to *legally* explain the unseen vessel, involved exceptional conditions, it cannot for a moment be said that they compare in this unusual character with the hypothesis that the *Strathalbyn* was an oncoming vessel attempting to navigate Puget Sound with her side lights invisible to a vessel ahead. It must always be remembered that almost every vessel bound for Tacoma which the *Strathalbyn*, sailing from Tacoma, would meet in the waters in question, would come on her on the same course and that with her obscured lights every passing signal given by the *Strathalbyn* and heard by them would be an invitation to a collision.

As we understand the ruling of this court, the Virginian's pilot was in fault for not navigating his vessel on the theory that the Strathlbyn was egregiously violating the law and coming down on her with her side lights so obscured. It holds that stopping and waiting the development of maneuvers thus properly indicated was not enough and that he should have *reversed his engines long before he could have actually known that the opposing vessel was not obeying the rules.*

As we understand the decisions in the following cases, we are compelled to assume that the opposing vessel is complying with the law or that she *will* comply with the law and correct any error on her part, even to the very jaws of the collision.

"Until the last moment the tug had a right to assume that she (the opposing vessel) would comply with the rules." * * *

"If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent."

The Delaware, 161 U. S. 459 at 469.

"Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her

course, would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger."

The Victory, 168 U. S. 410 at 426.

"Obedience to the rules is not a fault even if a different course would have prevented the collision, and the necessity must be clear and the emergency sudden and alarming before the act of disobedience can be excused. Masters are bound to obey the rules *and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules.*" (Italics ours.)

Belden v. Chase, 150 U. S. 674 at 699.

"Suppose, when he first discovered that there was something, he could not tell what, wrong with the *Acilia's* whistle, he had then either stopped and reversed, or starboarded his helm, and the *Acilia* had then obeyed the law and ported, and a collision ensued; would not the *Acilia's* proctor be justified in urging: 'You should never have presumed that we were going to act unlawfully. We never gave you two blasts, and why should you infer that we did not mean to keep to our side of the channel? If you had obeyed the rule, and ported, and kept on, instead of stopping, merely because our whistle was out of order, there would have been no collision.'"

The Acilia, (C. C. A.) 120 Fed. 455, at 460-461.

"The *Rome* was not bound to anticipate that the *Mack* would not act lawfully and comply with her agreement, and so long as there was apparent reasonable opportunity for her to swing and clear the *Rome* the latter might assume that she would do so."

Lake Erie Transp. Co. v. Gilchrist etc., 142 Fed. 89, at page 95.

This court in its opinion has not mentioned any of these decisions. It does not mention and apparently has not thought of, the Virginian's pilot's right to assume that the Strathalbyn's lights were *legally* invisible within the rules. If it stands we are violating the law unless we always guess rightly that a whistling vessel invisible on a clear night is going to ram us; if these other cases stand we are guilty if we fail to assume that she is obeying the rules and will not ram us.

We therefore urge that you grant a rehearing, not alone for the exoneration of the particular pilot, but for clearing up an uncertainty which must exist in our minds under this ruling whenever we hear a whistle from a vessel whose lights are invisible to us.

Rule 9 requires that the four blast signal of Rule 3 shall be given only when the opposing vessel's lights are in sight and her course and position therefore can be made determinate by her passing or other signals. The four blasts cannot help to clear up the "doubt" and "failure to understand", referred to in Rule 3, if the other vessel is not in sight, for it is only by combining sight and the whistles that intention or course can be communicated.

The four whistle inquiry signal of Rule 3, Article 18, is to be used by a vessel "in doubt", "when steam-vessels are approaching each other, and either vessel fails to understand the course or intention of the other, from any cause".

It is apparent that when, in the night time, vessel A is entirely out of sight of vessel B, the whistles from A will not tell B either A's course or her intention with regard to keeping or changing it. Mere sound cannot do this. It cannot disclose how far off the other vessel is, nor her direction within a wide radius, nor her previous course or conduct from which her passing or other whistle indicates she is about to make a change.

Visibility alone can make an intelligible answer to the four blast enquiry. We therefore find Rule 9 providing that:

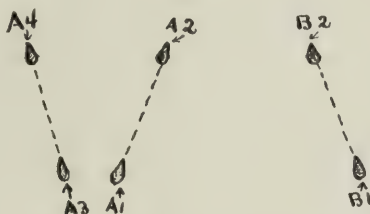
“The whistle signals provided in the rules under this article, for steam-vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each *can* be determined in the day-time by a sight of the vessel itself, or by night by seeing its signal lights.”

Combined Rules 3 and 9 say to the pilot: “If you fail to understand a vessel's course or intention, you may blow four blasts and thus ask her to clear up the doubt. As she cannot show her course or intention when you cannot see her, you must not blow them. You must wait till she is in sight and her course *can* be determined by combining what you see of her with what you hear, before blowing four whistles will bring any answer which will clear up your doubt.”

Judge Cushman fails entirely to realize this real meaning of the two rules and falls into the fatal error of supposing the mere ability to see a vessel's light at

night will enable one to determine her course and position (Apostles 1433). A very little thought will show the fallacy of his contention.

If the vessel be on a course crossing that of the observing vessel her light will seem to traverse the same amount of horizon as if on a diverging course. For instance:



B sees A's green light on her port hand at some distance. It will seem the same whether moving from position A¹ to A², or from position A³ to A⁴. It is only when A blows her one whistle that B learns that A is on course A¹ to A², and hence crossing B instead of steaming parallel or slightly away from her on course A³-A⁴.

In other words, seeing a vessel's light does not determine her course and position, but if the light is in sight these *can* be determined, i. e., by her whistles.

If, when B's red light is seen by A on her starboard hand, B blows two signals, doubt at once arises as to her course and intention. A will "fail to understand" it because, under Article 18, Rule 1, B's red light would require her to keep her course and speed, while her two blast signal indicates she will change her course to port. A hence blows four whistles, showing

her doubt and calling upon B to give a further whistle, properly explaining her intention and course. This is the legitimate and universal use to which the four blasts are put.

The above shows some of the reasons why the enquiry signals should be blown when the other's light is visible. There are also certain dangers in blowing the four whistles when the other vessel is out of sight, which warrant the prohibition against blowing them at that time.

Suppose two sea-going steam vessels, steaming on inland waters, are so maneuvering on crossing courses, at an acute angle, that a vessel approaching astern does not see any of their lights and are in this position:



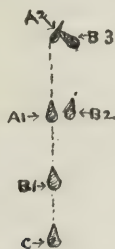
That is to say, A shows her green light to B's red and their courses cross at X. C, more than 2 points abaft their beams, hears the one blast signals of the invisible vessels. Suppose she blows four whistles of enquiry, although she has no part in the maneuver between the other two vessels, and suppose, as is quite likely, that her whistle is of the same type as used by the others.

A and B, who can see C, and know that as a following vessel she has no interest in the maneuver,

and hence no reason to blow any signals, will at once assume that something is wrong with the other ship in the crossing maneuver and start backing or otherwise changing courses. Is it not apparent that the use of the four whistles by a vessel who would only have occasion to use them on the assumption that the other vessels were violating the law and not showing lights when approaching is the proximate cause of any collision resulting from the confusion?

If this is correct, then it is a perfectly clear explanation for the requirement of Rule 9 that these signals for vessels meeting, passing or overtaking, shall be used only when the vessels are in sight of one another.

Another, and even more likely cause of disaster, if a vessel is allowed to use the four blasts where vessels invisible to her are maneuvering and giving signals because she believes one of them is "approaching" and Rule 3 applies, is the following:



A is followed by B, who asks by her one blast and receives permission by A's one blast, to overtake and pass her. C, who is astern of B, hears the whistle from the invisible vessels before her, imagines one of them is approaching her and, under Rule 3 blows

four blasts just as they are passing. A believes B is blowing them, B that A is blowing them, and both reverse. B has a left handed propeller, like the "Geo. W. Elder", and A a right handed one, like the "Beaver". Reversing sends them on curving courses towards one another as they advance under their remaining momentum and they collide.

Is it not apparent that these four-blast whistles to vessels not visible is the proximate cause of the loss? Is it not apparent that, if C had acted as if the others were obeying the law, i. e., under the supposition that the invisibility was *legal* and hence the unseen vessels not approaching, she would not have blown the four whistles and there would have been no collision?

In inland waters, where traffic is congested, indiscriminate blowing of four whistles whenever a signal is heard from an invisible vessel would not infrequently cause disaster.

This court has held in its opinion, and the lower court has held in its opinion, *both squarely*, that the Virginian was in fault for not blowing four whistles to the invisible Strathalbyn. This court, despite the gravity and importance of its ruling, gives no reasoning on it whatsoever. The lower court fails utterly to see the distinction between the vessel being in sight, so her course and position *can* be determined, as required by Rule 9, and her conduct when thus in sight being so contrary to the rules that her course and intent cannot be understood within Rule 3.

It is therefore prayed that there be a rehearing of this case, and that the court in determining it will take into consideration:

1. The embarrassing position of a pilot navigating in the darkness who, when he guesses rightly that an invisible whistling vessel is approaching, is compelled to assume that she is so near that there is danger of collision, when she can be so only if violating the law as to her lights; and at the same time is bound to assume under the decisions until she is so close that she cannot extricate herself if unaided, that she is not violating the law, and that her lights are proper;

2. And will construe Rule 9 as it plainly reads, namely, to prohibit the use of the four whistle blast except when the other vessel is in sight.

Or, if it will not decide these two matters, as we have here very respectfully suggested we think should be, will at least make its upsetting of these practices of pilots so clear and fully considered in its opinion that we may safely follow it.

Dated, San Francisco,

August 22, 1916.

Respectfully submitted,

SHIPOWNERS' ASSOCIATION OF THE
PACIFIC COAST,

By Oliver J. Olson,

Its President.

W. F. Sullivan,

Its Proctor.

No. 2730

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK IRVINE,

Plaintiff and Appellant,

vs.

ANGUS McDOUGALL, J. A. HEALEY, GEORGE
M. SMITH and ROY RUTHERFORD,

Defendants and Appellees.

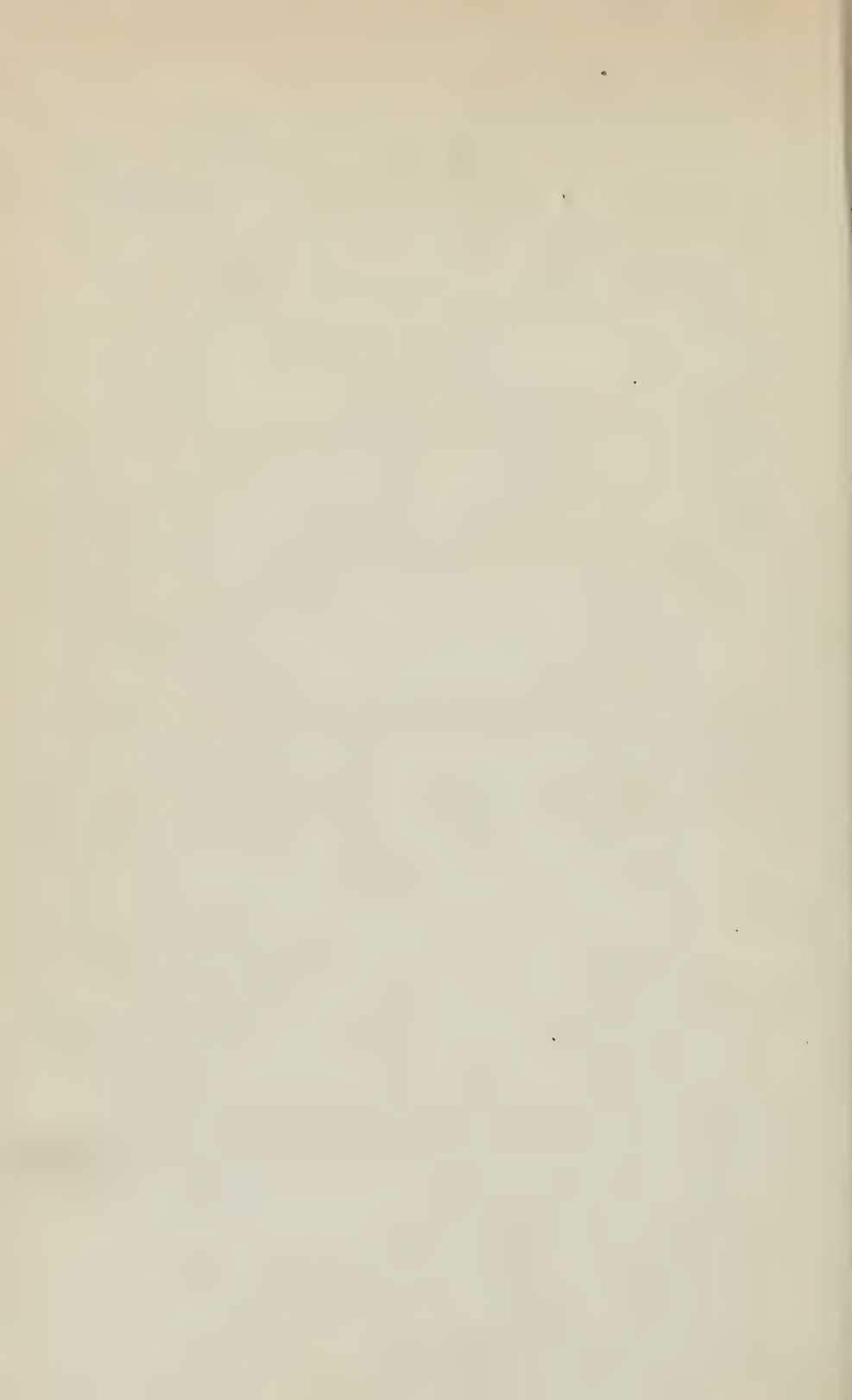
Transcript of Record.

**Upon Appeal from United States District Court of
the Territory of Alaska, Fourth
Division.**

Filed

JAN 7 - 1916

F. D. Monckton,
Clerk.



NO. _____

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK IRVINE,

Plaintiff and Appellant,

vs.

ANGUS McDOUGALL, J. A. HEALEY, GEORGE
M. SMITH and ROY RUTHERFORD,

Defendants and Appellees.

Transcript of Record.

**Upon Appeal from United States District Court of
the Territory of Alaska, Fourth
Division.**

Due service and receipt of three copies hereof admitted this.....day of December, 1915.

Attorney for Defendant and Appellee J. A. Healey.

Attorneys for Defendants and Appellees Roy Rutherford and Geo. M. Smith.

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In the District Court for the Territory of Alaska,
Fourth Division.

No. 1938

JACK IRVINE,

Plaintiff and Appellant,

vs.

ANGUS McDOUGALL, J. A. HEALEY, GEORGE
M. SMITH and ROY RUTHERFORD,

Defendants and Appellees.

Names and Addresses of Attorneys of Record:

HARRY E. PRATT, Fairbanks, Alaska,

LOUIS K. PRATT, Fairbanks, Alaska,

Attorneys for Plaintiff and Appellant.

CECIL H. CLEGG, Fairbanks, Alaska,

Attorney for Defendant J. A. Healey.

McGOWAN & CLARK, Fairbanks, Alaska,

Attorneys for Defendants,, George
M. Smith and Roy Rutherford.

Attorneys for Defendants and Appellees.

[Title of Court and Cause.]

Stipulation Relative to Printing Record.

IT IS HEREBY STIPULATED that in printing the papers and records to be used in the hearing in the appeal taken in the above entitled cause for the consideration of the Circuit Court of Appeals for the Ninth Circuit, that the title of the Court and cause in full, on all papers may be omitted, except on the first page of said record, and that there shall be in-

serted in place of said title, the words, "Title of Court and Cause"; also that all endorsements on all papers, except the Clerk's file marks and admission of service, need not be printed.

Dated at Fairbanks, Alaska, this 17th day of November, 1915.

HARRY E. PRATT,

LOUIS K. PRATT,

Attorneys for Plaintiff.

CECIL H. CLEGG,

Atty. for Defendant J. A. Healy.

McGOWAN and CLARK,

Attys. for Defs. Smith & Rutherford.

Filed in the District Court, Territory of Alaska, 4th Div., Nov. 18, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Praeipice for Record.

To J. E. CLARK, Clerk of the above-entitled Court:

YOU WILL PLEASE prepare transcript of record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, upon the appeal heretofore perfected to said Court. and will include in said transcript the following papers and records, to-wit:

1—Plaintiff's amended complaint as further amended by interlineation.

2—Defendant Healy's separate answer to said

amended complaint.

3—Separate answer of defendants Smith and Rutherford, to said amended complaint, which answer is designated by them, "Answer to Second amended complaint."

4—Order of the Court of May 21st, 1915, dismissing action as to defendants, McGowan, Clark, Cascaden and Kopitz.

5—Order of Court of October 27, 1915, refusing plaintiff's proposed findings of fact and conclusions of law and overruling plaintiff's objections to findings of fact prepared consonant to Court's decision.

6.—Findings of fact and conclusions of law signed by the Court October 29, 1915.

7—Order of Court of October 12, 1915, substituting attorneys.

8—Order of Court of November 4, 1915, denying motion for new trial.

9—Judgment and decree, signed November 9, 1915.

10—Bill of exceptions and order allowing and settling the same.

11—Petition for appeal.

12—Order allowing appeal, fixing appeal bond and designating place of hearing.

13—Bond on appeal.

14—Citation on appeal. (Original.)

15—Order extending time within which to docket appeal. (Original.)

16—Praeceptum for record.

17—Stipulation relative to printing record. (Original.)

18—Assignment of Errors.

This transcript to be prepared as required by law and the orders and rules of this Court forwarded to the aforesaid Circuit Court of Appeals to be filed in the office of the Clerk of said Court of Appeals for the Ninth Circuit, in said San Francisco, California, on or before the 31st day of January, 1916, pursuant to said order of this Court extending time.

Dated at Fairbanks, Alaska, this 18th day of November, 1915.

HARRY E. PRATT,

LOUIS K. PRATT,

Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, 4th Div., Nov. 18, 1915. J. E. Clark, Clerk, By Sidney Stewart, Deputy.

[Title of Court and Cause.]

Amended Complaint.

Comes now the above named plaintiff and for a first cause of action against the defendants alleges:

1. That on or about the 3rd day of February, 1913, defendant Angus McDougall hired him to work as a miner upon the Pioneer Quartz Mining Claim situated in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum

of Five and 50-100 Dollars (\$5.50) per day for each day of nine hours he worked thereon and an additional dollar for each hour of overtime; that pursuant to said agreement this plaintiff upon said date commenced work upon said claim, at no time ceasing work for a period of Thirty days and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked ninety-four (94) days and an additional one hundred ninety-seven (197) hours as overtime, for which there is due and owing, over all credits and set-offs, the sum of Seven hundred fourteen dollars, (\$714.00), no part of which has been paid.

2. That all of the above mentioned work, performed by plaintiff, was for the development and improvement of said mining claim, to-wit, sinking the main shaft, running tunnels, prospecting and so forth, upon said claim, and said work in fact did develop and improve said mining claim.

3. That the owners of said mining claim upon the 25th day of May, 1912 were Angus McDougall, Michael Hyland, Thos. A. McGowan, John A. Clark, who upon said 25th day of May, 1912, executed a written lease to the said Angus McDougall upon said mining claim for a period of Ten '(10) years from June 1st 1912, which said lease was recorded in the office of the commissioner and ex--officio recorder for the Fairbanks Precinct, Territory of Alaska, upon the 2nd day of September 1912, in book No. 5 of Leases, page 337 and numbered instrument 37027.

That said Angus McDougall is now the owner of said leasehold interest and for all times herein mentioned the said claim has been and now is owned by the above named owners except one Dave Cascaden who has succeeded to the interest of said Michael Hyland in said claim.

4. That the said first mentioned owners and the said Cascaden at all times knew that said McDougall was developing said claim and improving it under said lease and knew that said McDougall had hired men, including this affiant, to work upon said mine and knew that said men were developing and improving said claim. At no time did said first mentioned owners or Dave Cascaden post any notices negating liabilities for said work or any notices whatever.

5. That at all times this plaintiff has claimed the benefits of the laws of Alaska relative to Mechanics liens and upon the 7th day of June, 1913, claimed a lien upon said leasehold interest and also upon said mining claim for the above named amount due him for said labor, and upon said 7th day of June filed for record, in the office of the recorder of the precinct wherein said premises are situated, to-wit, the Fairbanks Precinct, Alaska, a sworn statement, containing a true statement of his demand after deducting all just credits and set-offs, describing the premises sufficiently for identification, claiming a mechanic's lien, for said amount, upon said leasehold interest and upon said mining claim, a copy of which said claim is hereto attached marked exhibit 1, and by

reference made a part hereof.

6. That plaintiff was compeled to, and did pay, the sum of \$2.25 for the recording of said lien statement and a reasonable sum for attorney's fees for the foreclosure thereof is the sum of \$143.00.

7. That the defendant John A. Healey, upon the 12th day of May, 1913, in case number 1907, this court, caused a writ of attachment to issue against Angus McDougall also defendant in said action number 1907, and levied the same upon said Pioneer Quartz claim and the buildings thereon, which said attachment is in full force.

8. That the defendant, John Kopitz, claims some interest or lien, in and to said Pioneer Quartz claim adverse to plaintiff.

9. That on or about the 3rd day of June 1913, said Angus McDougall made an assignment of certain property to George M. Smith and Roy Rutherford, for the benefit of his creditors, assigning, among other property, said Pioneer Lode claim and his leasehold interest therein subject to certain conditions, which said assignment is recorded in the office of the recorder for the Fairbanks Precinct, Alaska, in vol. 17 of deeds, page 449, and number, instrument 39019, being filed for record upon the 18th day of June 1913.

Plaintiff for a SECOND CAUSE OF ACTION against defendants alleges:

1. That on or about the 18th day of January, 1913, defendant Angus McDougall hired James Fox

to work upon the Pioneer Quartz mining claim, situated in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks creek on the left limit thereof on the divide between said creek and Wolf creek, agreeing to pay him therefore the sum of \$5.00 per day for each day of 9 hours he worked thereon and an additional dollar for each hour of over-time; that pursuant to said agreement said James Fox, upon said date, commenced work upon said claim, at no time ceasing work for a period of 30 days, and between said date and May 11 1913, the same being the last day he worked thereon, he worked 110 days and an additional 125 hours as over-time, for which there is due and owing, over all credits and set-offs, \$675.00 no part of which has been paid.

2. That all of the above mentioned work, performed by James Fox, was for the development and improvement of said mining claim, to-wit: running the engine in connection with sinking the main shaft, running tunnels, prospecting, etc.. upon said claim, and said work in fact did development and improve said mining claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs number three, four, seven, eight and nine, of the first cause of action herein, a part hereof.

4. That at all times James Fox has claimed the benefit of the laws of Alaska relative to mechanic's liens and upon the 2nd day of June 1913, claimed a lien upon said leasehold interest and also upon said

mining claim for the above named sum of \$675.00 due him for said labor, and upon said 2nd day of June filed for record, in the office of the recorder of the precinct wherein said premises are situated, to-wit, the Fairbanks Precinct, Alaska, a sworn statement containing a true statement of his demands after deducting all just credits and set-offs, describing the premises sufficiently for identification claiming a mechanic's lien for said amount upon said leasehold interest and upon said mining claim, a copy of which said claim is hereto attached marked exhibit 2, and by reference made a part hereof.

5. That James Fox was compelled to, and did pay the sum of \$2.25 for the recording of said lien and a reasonable sum for the foreclosure thereof is the sum of \$135.00 as attorneys fees.

6. That subsequent to the filing of said lien, said Fox, for a valuable consideration, assigned said claim against said McDougall and all the rights by virtue of having filed said lien, to the plaintiff, who is now the holder and owner thereof.

Plaintiff for a THIRD CAUSE OF ACTION against defendants alleges:

1. That on or about the 18th day of January, 1913, defendant Angus McDougall hired Donald Hayes to work as a miner upon the Pioneer Quartz Mining claim situated in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof on the divide between said creek and Wolf Creek, agreeing to pay him therefor the

sum of \$5.50 per day for each day of nine hours he worked thereon; that pursuant to said agreement Donald Hayes, upon said date commenced work upon said claim at no time ceasing to work for a period of thirty days, and between said date and May 12th 1913 the same being the last day he worked thereon he worked 106 1-2 days for which there is due and owing, over all credits and set-offs, \$585.75 no part of which has been paid.

2. That all of the above mentioned work, performed by said Hayes, was for the development and improvement of said mining claim, to-wit, sinking the main shaft, running tunnels, prospecting etc. upon said claim, and said work did in fact develop and improve said claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs three, four, seven, eight and nine of the first cause of action herein a part hereof.

4. That at all times said Hayes has claimed the benefits of the laws of Alaska relative to mechanic's liens and upon the second day of June 1913 claimed a lien upon said leasehold interest and also upon said mining claim for the above named amount due him for said labor and upon the said 2nd day of June filed for record in the office of the recorder of the precinct wherein said premises are situated, to-wit, the Fairbanks Precinct, Alaska, a sworn statement containing a true statement of his demand after deducting all just credits and set-offs, describing the

premises sufficiently for identification, claiming a mechanics lien for said amount upon said leasehold interest and upon said mining claim, a copy of which said claim is hereto attached marked exhibit 3 and by reference made a part hereof.

5. That said Hayes was compeled to and did pay the sum of \$2.25 for the recording of said lien and a reasonable sum for the foreclosing thereof is the sum of \$117.00 attorneys fees.

6. That subsequent to the filing of said lien said Hayes, for a valuable consideration, assigned said claim against McDougall and all rights by virtue of having filed said lien to the plaintiff who is now the owner and holder thereof.

For a FOURTH CAUSE OF ACTION AGAINST defendants plaintiff alleges:

1. That on or about the 9th day of December 1912, defendant Angus McDougall hired John Wensel to work upon the Pioneer Quartz Mining claim in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.00 for each day he worked thereon; that pursuant to said agreement said Wensel, upon said date commenced work upon said claim and between said date and May 12th 1913, the same being the last day he worked thereon he worked 126 1-2 days, upon which he has been paid \$14.00 and no more and there is still due and owing therefor over all credits and set-offs, the

sum of \$623.50.

2. That all of the above mentioned work performed by John Wensel was for the development and improvement of said mining claim, to-wit; cooking for the men sinking the main shaft, running tunnels, prospecting etc. upon said claim, and said work in fact did develop and improve said claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs three, four, seven, eight, and nine of the first cause of action herein a part hereof.

4. That at all times said Wensel has claimed the benefits of the laws of Alaska relative to mechanics liens and upon the 27th day of May 1913, claimed a lien upon said leasehold interest and also upon said mining claim for the above amount due him for said labor and upon said 27th day of May 1913, filed for record in the office of the Recorder of the precinct wherein said premises are situated, to-wit, the Fairbanks Precinct, Territory of Alaska, a sworn statement containing a true statement of his demand after deducting all just credits and set-offs, describing the premises sufficiently for identification, claiming a mechanics lien for said amount upon said leasehold interest and upon said mining claim, a copy of which said claim is hereto attached and marked exhibit 4, and by reference made a part hereof.

5. That said Wensel was compeled to and did pay the sum of \$2.25 for recording said lien and a reasonable sum for attorneys fees for foreclosing the same

is the sum of \$125.00.

6. That subsequent to the filing of said lien said Wensel for a valuable consideration, assigned said claim and all rights arising by virtue of having filed said lien, to the plaintiff who is now the owner and holder thereof.

Plaintiff, for a FIFTH CAUSE OF ACTION against defendants alleges:

1. That on or about the 18th day of April 1913, defendant Angus McDougall hired John Sully to work upon the Pioneer Quartz mining claim situated in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf creek, agreeing to pay him therefor the sum of \$1.50 per hour for each hour he worked thereon; that pursuant to said agreement said Sully, upon said date commenced work upon said claim and between said date and May 5th 1913, the same being the last day he worked thereon, he worked 178 hours, for which there is due and owing, over all credits and set-offs, the sum of \$267.00 no part of which has been paid.

2. That all of the above mentioned work performed by said Sully was for the development and improvement of said mining claim, to-wit; building a meat cache, ore bunker and tressel approach thereto, which said structures were necessary for the development of said mine and the provisions of the men engaged in such development, and said work did in fact develop and improve said claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs three, four, seven, eight and nine, of the first cause of action herein, a part hereof.

4. That at all times said Sully has claimed the benefits of the laws of Alaska relative to mechanic's liens and upon the 27th day of May 1913 claimed a lien upon the above named structures and also upon the ground under and surrounding the same necessary for their reasonable use; also upon said leasehold interest and said mining claim, for the above named amount due him for said labor and upon the said 27th day of May 1913, filed for record, in the office of the recorder of the precinct wherein said premises are situated, to-wit the Fairbanks Precinct, Alaska, a sworn statement, containing a true statement of his demand after deducting all just credits and set-offs, describing the premises sufficiently for identification, claiming a mechanic's lien for said amount upon said structures, the necessary surrounding ground, the said leasehold interest and said mining claim, a copy of which said claim is hereto attached and marked exhibit 5 and by reference made a part hereof.

5. That said Sully was compelled to and did pay the sum of \$2.25 for the recording of said lien and a reasonable sum for attorney's fee for the foreclosure thereof is \$54.00.

6. That subsequent to the filing of said lien said Sully, for a valuable consideration, assigned said

claim and all rights arising by virtue of having filed said lien, to the plaintiff who is now the owner and holder thereof.

For a SIXTH CAUSE OF ACTION against defendants, plaintiff alleges:

1. That on or about the 9th day of April 1913, defendant Angus McDougall hired Thomas King to work upon the Pioneer Quartz mining claim situated in the Fairbanks Precinct, Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.00 per day for each day of nine hours he worked thereon; that pursuant to said agreement said King, upon said date commenced work and at no time ceased work for a period of 30 days and between said date and May 12th 1913, the same being the last day he worked thereon, he worked 33 days for which there is due and owing, over all credits and set-offs, the sum of \$165.00, no part of which has been paid.

2. That all of the above mentioned work performed by said King was for the development and improvement of said mining claim, to-wit; necessary work in and in connection with running tunnels, prospecting etc. upon said claim, and said work did in fact improve and develop said claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs three, four, seven, eight and nine, of the first cause of action herein a part hereof.

4. That at all times Thomas King has claimed the benefits of the laws of Alaska relative to mechanic's liens and upon the 28th day of May 1913, claimed a lien upon said leasehold interest and also upon said mining claim for the above named amount due him for said labor, and upon said 28th day of May filed for record, in the office of the recorder of the precinct wherein said premises are situated, to-wit, the Fairbanks Precinct, Alaska, a sworn statement containing a true statement of his demand after deducting all just credits and set-offs, describing the premises sufficiently for identification claiming a mechanic's lien for said amount upon said leasehold interest and also upon said mining claim, a copy of which said claim is hereto attached marked exhibit 6, and by reference made a part hereof.

5. That said King was compelled to and did pay the sum of \$2.25 for the recording of said lien and a reasonable sum for attorneys fees for the foreclosure thereof is \$33.00.

6. That subsequent to the filing of said lien said King, for a valuable consideration, assigned said claim against McDougall, and all rights arising by virtue of having filed said lien to the plaintiff who is now the owner and holder thereof.

Plaintiff, for a SEVENTH CAUSE OF ACTION against defendants alleges:

1. That on or about the 28th day of December 1912, defendant Angus McDougall hired Henry Berks to work upon the Pioneer Quartz mining claim situ-

ated in the Fairbanks Precinct Territory of Alaska, at the head of Fairbanks Creek on the left limit thereof on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.50 per day for each day of 9 hours he worked thereon; that pursuant to said agreement said Berks, upon said date, commenced work upon said claim, at no time ceasing work for a period of 30 days, and between said date and May 12th 1913, the same being the last day he worked thereon, he worked 123 1-2 days, for which there is due and owing, over all credits and set-offs, the sum of \$679.25 no part of which has been paid.

2. That all of the above mentioned work performed by said Berks was for the development and improvement of said mining claim, to-wit; sinking the main shaft, running tunnels, prospecting etc. upon said claim and said work in fact did develop and improve said claim.

3. Plaintiff refers to embraces herein and makes the contents of paragraphs three, four, seven, eight and nine of the first cause of action herein, a part hereof.

4. That at all times said Berks has claimed the benefits of the laws of Alaska relative to mechanic's liens and upon the 7th day of June 1913, claimed a lien upon said lease-hold interest and also upon said mining claim for the above named amount due for said labor and upon said 7th day of June filed for record in the office of the recorder of the pre-

cinct wherein said premises are situated, to-wit, the Fairbanks, Precinct, Alaska, a sworn statement, containing a true statement of his demand after deducting all just credits and set-offs, describing said premises sufficiently for identification, claiming a mechanic's lien for said amount upon said lease-hold interest and upon said mining claim, a copy of which said claim is hereto attached and marked exhibit 7 and by reference made a part hereof.

5. That said Berks was compelled to and did pay the sum of \$2.25 for recording said lien claim and a reasonable sum for attorneys fees for the foreclosure thereof is \$136.00.

6. That subsequent to the filing of said lien said Berks, for a valuable consideration, assigned said claim and all rights arising by virtue of having filed said lien, to the plaintiff who is now the owner and holder thereof. .

Wherefore plaintiff prays judgment against defendants as follows:

1. Against Angus McDougall for the sum of \$3,709.50 together with interest thereon at 8 per cent per annum from June 15th 1913; for the sum of \$743.00 as attorneys fees;

2. Against the defendant J. A. Healey, decreeing his said attachment lien subsequent and subservient to plaintiff's liens with interest and attorney's fees, and restraining said Healey from attempting any sale of said ground under said attachment lien;

3. Against George M. Smith and Roy Rutherford

decreeing their said title in and to said claim and buildings to be subsequent and subservient to plaintiffs liens.

4. Against the defendant John Kopitz requiring him to set up his claim against said claim and decreeing the same subsequent to plaintiff's lien.

5. Foreclosing plaintiff's said liens against said claim said leasehold interest and buildings thereon and ordering the sale thereof to satisfy said principle amount of \$3709.50, with interest thereon at 8 per cent per annum from June 15th 1913 and attorneys fees to the amount of \$743.00.

6. Decreeing said claim and the whole title thereto subject to plaintiffs liens including attorney's fees, and cutting off forever, the interest of the defendants McDougall, Thomas A. McGowan, John A. Clark, and Dave Cascaden, therein.

7. For costs and disbursements and such relief as to the Court may seem equitable and just.

LOUIS K. PRATT & SON,

Louis K. Pratt & Son,

Attorneys for Plaintiff.

United States of America,

Territory of Alaska,—ss.

Jack Irvine being first duly sworn on oath says: I am the plaintiff in the above entitled suit; I have read the foregoing complaint and the allegations therein contained are true as I verily believe.

JACK IRVINE,

Subscribed and sworn to before me this 15th day

of October, 1913.

(Seal)

HARRY E. PRATT.

Notary Public for Alaska.

My Commission Expires June 24th, 1916.

EXHIBIT 1.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

JACK IRVINE, being first duly sworn, on oath says:— That on or about the 3rd day of February, 1913, one, Angus McDougall, hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof on the divide between said creek and Wolf Creek, agreeing to pay him therefor, the sum of \$5.50 per day for each day of nine hours he worked thereon, and an additional dollar for each hour of overtime; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 94 days and an additional 197 hours as overtime, for which there is due and owing \$714.00, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the leasehold interest hereinafter described of the said Angus McDougall, in said claim; that the above mentioned time was put in

wholly in doing development and improvement work upon said mine, to-wit: sinking the main shaft, running tunnels, prospecting, etc. upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first mentioned owners and said Cascaden knew said McDougall was developing said claim under said lease and knew that said McDougall, with hired men including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

JACK IRVINE.

Subscribed and sworn to before me this 20th day of May, 1913.

(Seal)

HARRY E. PRATT,
Notary Public in and for Alaska.

EXHIBIT 2.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

JAMES FOX, being first duly sworn, on oath says:
—That on or about the 18th day of January, 1913, one, Angus McDougall, hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.00 per day for each day of nine hours he worked thereon, and an addition dollar for each hour of overtime; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 11th, 1913, the same being the last day he worked thereon, he worked 110 days and an additional 125 hours as overtime, for which there is due and owing \$675.00, no part of which has been paid and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the leasehold interest hereinafter described of said Angus McDougall in said claim; that the above mentioned time was put in wholly in running the engine in connection with sinking the main shaft, running tunnels, prospecting, etc. upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall,

Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first mentioned owners and said Cascaden knew said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

JAMES FOX,

Subscribed and sworn to before me this 20th day of May, 1913.

(Seal)

HARRY E. PRATT,

Notary Public in and for Alaska.

EXHIBIT 3.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

DONALD HAYES, being first duly sworn, on oath says:—That on or about the 18th day of January 1913, one, Angus McDougall, hired him to work upon

the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf creek, agreeing to pay him therefor, the sum of \$5.50 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th 1913, the same being the last day he worked thereon, he worked 106 1-2 days, for which there is due and owing \$585.75, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the lease-hold interest hereinafter described, of the said Angus McDougall, in said claim; that the above mentioned time was put in wholly in doing development and improvement work upon said mine, to-wit; sinking the main shaft, running tunnels, prospecting, etc. upon said claim.

That the owners of said mining claim, upon the 25th day of May 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date executed a written lease to the said Angus McDougall upon said mining claim for a period of ten years from June 1st 1912, and said McDougall is now the owner of said lease-hold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been, and now are, the same as above mentioned, except that

one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim: that said first mentioned owners and said Cascaden knew that said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

DONALD HAYES

Subscribed and sworn to before me this 20th day of May 1913.

(Seal)

HARRY E. PRATT

Notary Public in and for Alaska.

EXHIBIT 4.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

JOHN WENZEL, being first duly sworn, on oath says:—That on or about the 3rd day of May, 1913, one, Angus McDougall, hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.00 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced worked upon said claim, at no time ceasing work for a period of thirty days, and between

said date and May 12, 1913, the same being the last day he worked thereon, he worked 9 1-2 days, for which there is due and owing \$47.50, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the leasehold interest of the said McDougall in said claim; that the above mentioned time was put in wholly in cooking for the men sinking the main shaft; running tunnels, prospecting, etc. on said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1913, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first mentioned owners and said Cascaden knew said McDougall, was developing said claim under said lease and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden, post any notices negativ-

ing liability for said work.

JOHN WENSEL

Subscribed and sworn to before me this 20th day of May, 1913.

(Seal)

HARRY E. PRATT.

Notary Public in and for Alaska.

Endorsed:

Claim for Mechanics Lien. JOHN WENZEL.

EXHIBIT 5.

CLAIM FOR MECHANIC'S LIEN.

United States of America,

Territory of Alaska,—ss.

JOHN SULLY being first duly sworn on oath says:—that on or about the 18th day of April 1913, one Angus McDougall hired him to work, to build a meat cache, ore bunker and tressel approach thereto, upon the Pioneer Quartz Mining claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$1.50 per hour; that pursuant to said contract, this affiant, upon said date, commenced said work and completed it between said date and May 5th, 1913, the same being the last day he worked thereon, working thereon 178 hours, for which there is due, owing and unpaid the sum of \$267.00 for which this affiant now claims a lien for said amount with interest at 8 per cent per annum from date hereof, upon said meat cache, ore bunker and tressel approach, together with sufficient ground surrounding the same for its

convenient use; affiant also claims a lien for said amount upon said mining claim and also upon the leasehold interest, hereinafter described, of the said Angus McDougall in said claim.

That the owners of said mining claim, upon the 25th day of May 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan, and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1913, the owners of said claim have been and now are the same as above mentioned, except that one Dave Cascaden has succeeded to the interest of Michael Hyland in said claim; that the said first mentioned owners and said Dave Cascaden knew said McDougall was developing said claim under said lease and knew said McDougall, with hired men, including this affiant was developing said mining claim as aforesaid and building said buildings but at no time posted any notices negating liability for said work.

JOHN SULLY.

Subscribed and sworn to before me this 20th day of May 1913.

'(Seal)

HARRY E. PRATT,
Notary Public in and for Alaska.

EXHIBIT 6.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

THOMAS KING, being first duly sworn, on oath says:—That on or about the 9th day of April, 1913, one, Angus McDougall, hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereon, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5.00 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 33 days, for which there is due and owing \$165.00, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the leasehold interest hereinafter described of said Angus McDougall in said claim; that the above mentioned time was put in wholly in development work in and in connection with running tunnels, prospecting etc., upon said claim.

That the owers of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease

to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first mentioned owners and said Cascaden knew said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

TOM KING.

Subscribed and sworn to before me this 28th day of May, 1913.

(Seal)

HARRY E. PRATT,

Notary Public in and for Alaska.

Endorsed:

Claim for Mechanics Lien.

TOM KING.

EXHIBIT 7.

CLAIM FOR MECHANICS LIEN.

United States of America,
Territory of Alaska,—ss.

HENRY BERKS, being first duly sworn, on oath says:—That on or about the 28th day of December, 1912, one, Angus McDougall, hired him to work upon the Pioneer Quartz Mining Claim situate at the head

of Fairbanks Creek on the left limit thereof, on the divide between said Creek and Wolf Creek, agreeing to pay him therefor, the sum of \$5.50 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 123 1-2 days, for which there is due and owing \$679.25, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8 per cent per year, upon said mining claim and also upon the leasehold interest of the said Angus McDougall, in said claim; that the above mentioned time was put in wholly in doing deveolpment and improvement work upon said mine, to-wit: sinking the main shaft, running tunnels, prospecting, etc. upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been, and now are, the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first men-

tioned owners and said Cascaden knew that said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

HENRY BERKS.

Subscribed and sworn to before me this 20th day of May, 1913.

(Seal)

HARRY E. PRATT,
Notary Public in and for Alaska.

Service of within amended complaint, by receipt of copy thereof, is hereby acknowledged this 15th day of October, 1913.

CECIL H. CLEGG,
Attorney for deft. Healey.
McGOWAN & CLARK,
JOHN A. CLARK,

Attorneys for defts. Smith and Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 15, 1913. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Answer of Defendant Healey.

Comes now J. A. Healey, one of the defendants above named and for answer to the amended complaint on file herein, says

1.—That he has no knowledge information or be-

lief as to any of the allegations contained in any of the paragraphs numbered 1, 2, 4, 6, 8 and 9, and basing his denial on such lack of knowledge, information and belief, therefore denies all of the allegations contained in each of said paragraphs and the whole thereof, contained in the FIRST alleged cause of action set up in said amended complaint.

2.—That he admits the allegations contained in paragraph numbered three '(3) contained in said FIRST alleged cause of action set up in said amended complaint.

3.—Denies the allegation contained in paragraph numbered 5 contained in said FIRST alleged cause of action set up in said amended complaint.

4.—Admits the allegations contained in paragraph numbered seven contained in said FIRST alleged cause of action set up in said amended complaint.

It is hereby stipulated by and between the attorneys for plaintiff and defendant Healey that an answer to each of the remaining causes of action in the amended complaint herein may be considered as made and filed with the same admissions and denials where applicable and appropriate as are made in the foregoing answer to the first cause of action, and that the allegations in each of said remaining causes of action as to the assignment of the respective claims of lien sued upon may also be deemed denied upon lack of knowledge, information and belief, and that verification of this answer is waived.

Dated Feb 5 1915.

LOUIS K. PRATT & SON,

Attorney for Plaintiff.

CECIL H. CLEGG,

Attorney for deft. Healey.

CECIL H. CLEGG,

Atty. for deft. J. A. Healey.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 6, 1915. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Answer to Second Amended Complaint.

Come now the defendants, George M. Smith and Roy Rutherford, appearing for themselves separately, as Trustees for the creditors of Angus McDougall, the defendant above named, and for answer to plaintiff's amended complaint, as amended by interlineation, admit, deny and allege as follows, to-wit:

I.

For answer to plaintiff's first cause of action, these answering defendants admit the allegations of paragraphs 7 and 9 thereof; and allege that, as to the matters contained in paragraphs 1, 2, 3, 4, 5, 6 and 8 thereof, they have no knowledge or information concerning said allegations, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

II.

For answer to plaintiff's alleged second cause of

action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4, 5, and 6, and basing their denial upon such lack of information and belief, deny each and every matter therein contained; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the second cause of action by reference, but as to the matters and things contained in paragraphs 3, 4 and 8 of plaintiff's first cause of action, made a part of said second cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

III.

For answer to plaintiff's alleged third cause of action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4, 5, and 6, and basing their denial upon such lack of information and belief, deny each and every matter contained therein; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the third cause of action by reference, but as to the matters contained in paragraphs 3, 4 and 8 of plaintiff's first cause of action,

made a part of said third cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

IV.

For answer to plaintiff's alleged fourth cause of action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4, 5 and 6, and basing their denial upon such lack of information and belief, deny each and every matter therein contained; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the fourth cause of action by reference, but as to the matters contained in paragraphs 3, 4 and 8 of plaintiff's first cause of action, made a part of said fourth cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

V.

For answer to plaintiff's alleged fifth cause of action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4, 5 and 6, and basing

their denial upon such lack of information and belief, deny each and every matter therein contained; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the fifth cause of action by reference, but as to the matters contained in paragraphs 3, 4 and 8 of plaintiff's first cause of action, made a part of said fifth cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

VI.

For answer to plaintiff's alleged sixth cause of action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4, 5 and 6, and basing their denial upon such lack of information and belief, deny each and every matter therein contained; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the sixth cause of action by reference, but as to the matters contained in paragraphs 3, 4, and 8 of plaintiff's first cause of action, made a part of said sixth cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient

to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

VII.

For answer to plaintiff's alleged seventh cause of action, these answering defendants allege that they have no knowledge or information as to the matters contained in paragraphs 1, 2, 4 and 5 and 6, and basing their denial upon such lack of information and belief, deny each and every matter therein contained; as to the matters contained in paragraph 3 thereof, these answering defendants admit the allegations of paragraphs 7 and 9 of plaintiff's first cause of action, made a portion of the seventh cause of action by reference, but as to the matters contained in paragraphs 3, 4 and 8 of plaintiff's first cause of action, made a part of the seventh cause of action by reference, these answering defendants allege that they have no knowledge or information concerning the same, sufficient to form a belief, and basing their denial upon such lack of information and belief, deny each and every allegation therein contained.

WHEREFORE these answering defendants pray that the plaintiff take nothing by his said action and that they have judgment for their costs incurred herein.

McGOWAN & CLARK,
Attorneys for Defendants Smith and Rutherford.

United States of America,
Territory of Alaska,—ss..

GEO. M. SMITH, being first duly sworn, on oath deposes and says that he is one of the answering defendants named in the foregoing answer, and makes this verification in his own behalf and in behalf of his co-defendant, Roy Rutherford, as Trustees for the creditors of Angus McDougall, and individually; that he has read the foregoing answer, knows the contents thereof, and the statements therein made are true as he verily believes.

GEORGE M. SMITH.

Subscribed and sworn to before me this 27 day of March, 1915.

(Seal)

JOHN A. CLARK,
Notary Public for Alaska. My Commission expires
Apr. 24, 1918.

Due service of the within answer and receipt of a copy thereof are hereby acknowledged this..... day of March, 1915.

LOUIS K PRATT & SON,
Attorney for Plaintiff.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div. March 27, 1915. Angus McBride, Clerk.

[Title of Court and Cause.]

Order of Dismissal as to Certain Defendants.

On motion of Harry E. Pratt, attorney for plaintiff, John A. Clark, attorney for defendants, consent-

ing thereto, the Court ordered the cause dismissed as to the defendants John A. Calrk, Thos. A. McGowan, Dave Cascaden and John Kopitz.

CHARLES E. BUNNELL,
District Judge.

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable Charles E. Bunnell, Judge, presiding, in the above entitled Court, on the 21st day of May, 1915, at 10 o'clock A. M. Harry E. Pratt, appearing as one of plaintiff's attorneys; Messrs. McGowan & Clark appearing as attorneys for Geo. M. Smith and Roy Rutherford, defendants; and Cecil H. Clegg, appearing as attorney for defendant, J. A. Healy, when the following proceedings were had and testimony was taken:

JACK IRVINE being first duly sworn as a witness on behalf of the plaintiff, testified as follows:

DIRECT.

BY MR. PRATT:

Q. What is that (handing paper to witness)?

A. That is the assignment.

Q. The names that appear down here are James Fox, Donald Hayes, Henry Berks, John Sully, John Wensel and Tom King. Are those the same individuals whose lien claims are included in your suit here? A. They are.

Q. When was that assignment delivered to you

and executed?

(Objection).

A. Shortly after the liens were filed.

Q. With reference to the filing of your suit, when was that delivered to you?

A. It was before the suit was started.

Q. It speaks of the Pioneer Quartz Mining Claim at the head of Fairbanks Creek. In what precinct is that claim that is here referred to?

(Objected to by defendant).

Q. That is the Pioneer Claim mentioned in your complaint? A. Yes

MR. PRATT: I offer this assignment."

Whereupon said paper was offered and received in evidence and marked "Plaintiff's Exhibit "I", and was in words and figures as follows:

"For value received, I hereby assign and sell to Jack Irvine, my claim against Angus McDougall for work and labor performed upon the Pioneer Quartz Mining Claim at the head of Fairbanks creek and also any and all rights which I may have by virtue of having filed a mechanic's lien for said amount upon said claim.

JAMES FOX
DONALD HAYES
JOHN WENSEL
JOHN H. SULLY
HENRY BERKS
TOM KING "

Q. You are the owner of those claims therein as-

signed, are you, Mr. Irvine? A. Yes sir."

JAMES FOX being first duly sworn as a witness on behalf of plaintiff testified as follows, to-wit:

CROSS-EXAMINATION.

BY MR. CLEGG:

Q. Mr Fox, Mr. Pratt showed you your claim of lien here — A. Yes.

Q. —Signed James Fox on the 20th day of May, 1913, sworn to before Harry E. Pratt. Do you remember that occasion? A. Yes.

Q. Was that signed and sworn to on the day it bears date? A. I think so.

Q. Did you sign this assignment to Irvine at the same time? A. I think I did.

Q. Your name is the first one there,—James Fox? A. Yes.

Q. That was done the very same day, was it?

A. I wouldn't be certain of it, but I think it was.

Q. You don't remember of going there upon two occasions and signing two different papers?

A. No. I don't.

DONALD HAYES, witness for plaintiff, duly sworn, testified.

CROSS-EXAMINATION

BY MR. CLEGG:

Q. At the time you signed this mechanic's lien which is filed and which Mr. Pratt just showed to you there, that was dated on the 20th of May. Was that signed on that date—your lien claim, was that signed on the date it bears?

A. I don't know.

Q. Did you sign and swear to it on the 20th day of May?

A. I don't recollect what date it was. I didn't make a note of it at the time.

Q. That is the day yours is dated, and I presume that is the date it was signed. A. Yes.

Q. That is your signature? A. Yes..

Q. You assigned this claim to Irvine, did you?

A. Yes sir.

Q. That is your signature on there. Did you sign that? A. That is my name.

Q. Donald Hayes? A. Yes.

Q. When did you sign that, the same day?

A. It was the 20th day of May, the same day.

MR. CLEGG: That is all.

(REDIRECT)

BY MR. PRATT:

Q. You signed the assignment at the same time you signed your lien claim, Mr. Hayes? A. Yes.

Q. Do you remember what your instructions were as to when the assignment should be delivered to Irvine?

(Objected to by defendant as immaterial. Overruled: exception).

Q. Do you remember what you told me as to when I was to deliver that assignment?

A. To Mr. Irvine?

Q. Yes. (Same objection and same ruling, and exception).

A. Yes. I remember.

Q. What were your instructions, that is, with reference to the time of filing the mechanics lien, with reference to that point?

A. I remember instructing you to give that to Mr. Irvine; that I assigned my claim to Mr. Irvine.

Q. And he was going to handle it for you all the way through? A. Yes.

TOM KING, witness for plaintiff, duly sworn, testified.

CROSS-EXAMINATION.

BY MR. CLEGG:

Q. Can you remember when you signed it (King's claim of Lien) with reference to the date?

A. I don't know, but it was in May.

Q. 28th of May I suppose?

A. It was sometime in May, but as to the date I wouldn't swear to it.

Q. You signed this other paper assigning your claim to Jack Irvine at the same time. A. No sir.

Q. When. A. Later.

Q. How long?

A. It was quite a while afterwards.

Q. About how long.

A. This here? (Assignment).

Q. Yes. A. I signed that today.

MR. PRATT:

Q. At the time you made out your claim, what was the understanding as to what you were going to do with the claim and who was going to bring the

suit?

'(Defendants object as irrelevant and immaterial. Overruled. Defendants except; exception allowed).

A. It was to turn it Jack Irvine for to get our pay out of the claim.

Q. After the filing of the lien you were to assign it to Jack to bring the suit.

A. Yes.. And I left immediately from here and went up the river.

DIRECT.

MR. PRATT:

Now, in regard to those assignments, most of them were signed on the same day that the lien claims were signed, with instructions that I was to hold the same, and deliver it to Jack Irvine after the filing of the liens and before the commencement of the suit; and Mr. King also orally assigned the claim to take effect as soon as the lien was filed, but, through an oversight, he didn't sign it until today.

MR. CLEGG: Q. Mr. Pratt, you have had that assignment in your possession ever since the time it was signed, have you. A. Yes.

MR. PRATT: I might say about that assignment: After the liens were all filed. I told Jack that I had the assignment here and I turned it over to him formally, but I kept it in my possession; I told him I turned it over to him, and we would bring the suit, and we did."

Thereafter and upon the 15th day of October, 1915, plaintiff submitted to the Court, his proposed

findings of fact and conclusions of law, which were in words and figures, as follows:

[Title of Court and Cause.]

**Plaintiff's Proposed Findings of Fact and Conclusions
of Law.**

This cause came on for trial before the Court in open session upon the 21st day of May, 1915, upon the amended complaint of plaintiff as further amended by interlineation; the answer of the defendant J. A. Healy, and the answer of the defendants Geo. M. Smith and Roy Rutherford; the plaintiff appeared in person and by Harry E. Pratt, one of his attorneys; the defendant J. A. Healy, appeared by his attorney, Cecil H. Clegg; and the defendants, Geo. M. Smith and Roy Rutherford, appeared by John A. Clark, one of their attorneys. The plaintiff introduced evidence in support of his case but the appearing defendants declined to introduce any so at the close of the case, the Court took the same under advisement and upon the 1st day of June, 1915, announced his decision, which was and is, as follows, to-wit:

FINDINGS OF FACT

1—That the defendant, Angus McDougall was, at Valdez, Alaska, upon the 17th day of October, 1913, duly and regularly personally served with summons in this cause and was upon the 19th day of January, 1914, again duly and regularly served with summons in this cause, together with a copy of the amended

complaint herein: That said defendant, Angus McDougall, made no appearance of any kind and upon the 17th day of May, 1915, his default herein was duly and regularly entered.

2—That the defendant, Angus McDougall, for all times mentioned herein, was one of the owners in common of that certain quartz mining claim in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, known as the Pioneer Quartz Mining claim, situate at the head of Fairbanks creek on the left limit thereof, on the divide between said creek and Wolf creek; That during said period, said Angus McDougall was also the owner of that certain leasehold interest in and to said claim made in writing upon the 25th day of May, 1912, by Angus McDonald, Michael Hyland, Thomas A. McGowan and John A. Clark, the owners thereof, to Angus McDougall, wherein said claim was leased to said Angus McDougall for mining purposes for the period of ten years from June 1st, 1912, reserving to said owners, in payment for said lease, no rent for the first year thereof, but ten per cent of the gross output thereof for the second and third years and fifteen per cent for the remaining years thereof, which said lease was filed for record in the office of the Commissioner and Exofficio Recorder of the Fairbanks Precinct, Territory of Alaska, upon the 2nd day of September, 1912 and recorded therein in Book No. 5 of Leases, page 337 and numbered instrument No. 37027.

3—That upon the 3rd day of February, 1913, the

defendant, Angus McDougall hired plaintiff, Jack Irvine to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 Dollars (\$5.50) per day and One Dollar (\$1.00) per hour for over-time; That pursuant to said hiring, plaintiff—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim Ninety-four (94) days and One Hundred and Ninety-seven (197) hours over-time, at no time ceasing work thereon for a period as long as thirty days; That the plaintiff has been paid nothing for said work and there is due and owing him from said defendant, Angus McDougall therefor, the sum of Seven Hundred and Fourteen Dollars (\$714.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of plaintiff was development work and the same did, in fact develop and improve said mining claim and leasehold interest.

4—That upon the 7th day of June, 1913, plaintiff filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a

Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

5—That plaintiff was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25), and was compelled to employ an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Forty-three Dollars (\$143.00).

6—That the said J. A. Healy, in an action in this Court, numbered herein 1907, and entitled J. A. Healy, plaintiff against Angus McDougall, Defendant, caused a writ of attachment to issue therein and upon the 13th day of May, 1913, levied the same upon the aforesaid mining claim.

7—That upon the 3rd day of June, 1913, said Angus McDougall made an assignment of the aforesaid claim and leasehold interest, among other property and subject to certain conditions to the defendants George M. Smith and Roy Rutherford, for the benefit of his creditors, which said assignment was filed for record upon the 18th day of June, 1913, and is recorded in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska in Volume 17 of Deeds page 449, Instrument No. 39019.

8—That upon the 18th day of January, 1913, the defendant, Angus McDougall hired James Fox to work upon the aforesaid claim, as a miner, at the rate of Five Dollars (\$5.00) per day and One Dollar

(\$1.00) per hour for overtime; That pursuant to said hiring, James Fox—between said day and the 11th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Ten (110) days and One Hundred and twenty-five (125) hours over-time, at no time ceasing work thereon for a period as long as thirty days; that James Fox was paid nothing for said work and there was due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Seventy-Five Dollars (\$675.00), over and above all counterclaims, credits and off-sets, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of James Fox was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

9—That upon the 2nd day of June, 1913, James Fox filed in the office of the Recorder of the Fairbanks, Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring; a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

10—That the cost of filing said lien claim of James Fox was the sum of Two and 25-100 Dollars (\$2.25) and a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Thirty-five Dollars (\$135.00).

11—That upon the 18th day of January, 1913, the defendant, Angus McDougall hired Donald Hayes to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 Dollars (\$5.50) per day; That pursuant to said hiring, Donald Hayes—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Six and one-half (106 1-2) days, at no time ceasing work thereon for a period as long as thirty days; That Donald Hayes was paid nothing for said work and there was due and owing from said defendant, Angus McDougall therefor, the sum of Five Hundred Eighty-five and 75-100 Dollars (\$585.75), over and above all counter-claims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of Donald Hayes was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

12—That upon the 2nd day of June, 1913, Donald Hayes filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name

of the person who hired him to work thereon, and the contract of said hiring; a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

13.—That the cost of filing said lien claim of Donald Hayes was the sum of Two and 25-100 Dollars (\$2.25) and a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Seventeen Dollars (\$117.00).

14.—That upon the 9th day of December, 1912, the defendant, Angus McDougall hired John Wensel to work upon the aforesaid claim, at the rate of Five Dollars '(\$5.00) per day; That pursuant to said hiring, John Wensel—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Twenty-six and a half (126 1-2) days; That there has been paid John Wensel for said work the sum of Fourteen Dollars (\$14.00) and no more, and there is due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Twenty-three and 50-100 Dollars (\$623.50), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; That all of the above mentioned work of John Wensel, consisted of cooking for the men

who were doing development work upon said claim and it was necessary for said men to have a cook in order that their services should not be taken from development work to cook their own meals.

15—That upon the 27th day of May, 1913, John Wensel filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing the said work.

16—That said John Wensel was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25) and was compelled to employ an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Twenty-five Dollars (\$125.00).

17—That said John Wensel ceased working upon said claim entirely, for the full month of April, 1913.

18—That upon the 18th day of April, 1913, the defendant, Angus McDougall hired John Sully to work upon the aforesaid claim, at the rate of One and 50-100 Dollars (\$1.50) an hour; That pursuant to

said hiring, John Sully—between said day and the 5th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Seventy-eight (178) hours; That John Sully has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefore, the sum of Two Hundred and Sixty-seven Dollars (\$267.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20th, 1913; that all of the above mentioned work of John Sully was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

19—That upon the 27th day of May, 1913, John Sully filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work. .

20—That John Sully was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars '(\$2.25), and was compelled to employ

an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of Fifty-four Dollars (\$54.00).

21—That upon the 9th day of April, 1913, the defendant, Angus McDougall hired Tom King, to work upon the aforesaid claim, as a miner, at the rate of Five Dollars '(\$5) per day; That pursuant to said hiring Tom King—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim Thirty-three (33) days; That Tom King has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefor, the sum of One Hundred and Sixty-five Dollars (\$165.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 30, 1913; that all of the above mentioned work of Tom King was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

22—That upon the 28th day of May, 1913, Tom King filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a

Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

23—That Tom King was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25), and was compelled to employ an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of Thirty-three dollars (\$33.00).

24—That upon the 28th day of December, 1912, the defendant, Angus McDougall, hired Henry Berks to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 Dollars (\$5.50) per day; That pursuant to said hiring, Henry Berks—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Twenty-three and a half (123 1-2) days, at no time ceasing work thereon for a period as long as thirty days; That Henry Berks has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Seventy-nine and 25-100 Dollars (\$679.25), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20th, 1913; that all of the above mentioned work of Henry Berks was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

25—That upon the 7th day of June, 1913, Henry

Berks filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

26—That Henry Berks was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars '(\$2.25), and was compelled to employ an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Thirty-six Dollars (\$136.00).

27—That the aforesaid James Fox, Donald Hayes, John Sully and Henry Berks, had good and valid mechanic's liens upon the aforesaid interests of Angus McDougall, upon the filing of the aforesaid lien claims and after the filing of the same and before the commencement of this suit, sold and assigned the said claims and their rights by reason of having filed said mechanic's liens, to the plaintiff, Jack Irvine, who was the owner thereof at the commencement of this suit and is still the owner thereof.

28—That the aforesaid Tom King had a good and

valid mechanic's lien upon the aforesaid interests of Angus McDougall, after he had filed his aforesaid claim and after the filing the same and before the commencement of this suit, sold and assigned the said claim against Angus McDougall, and his rights, by reason of having a mechanic's lien thereon, to the plaintiff, Jack Irvine, who was the owner and holder thereof at the time of the commencement of this suit and still is such owner.

CONCLUSIONS OF LAW.

1—That the plaintiff, Jack Irvine, has a good and valid mechanic's lien upon the interests of Angus McDougall in and to said mining claim and leasehold interest to the extent that such interests existed upon the 3rd day of February, 1913, for the sum of Seven Hundred and Fourteen Dollars (\$714.00), with interest thereon from May 20, 1913, at eight per cent per annum; for the further sum of Two and 25-100 Dollars (\$2.25), expense of filing his said lien statement; for the further sum of One Hundred and Forty-three Dollars (\$143.00) as attorney's fee for the foreclosure of said lien and for the costs and disbursements of this suit.

2—That said Jack Irvine is entitled to a judgment against the said Angus McDougall for the above mentioned amounts and for the judgment foreclosing said mechanic's lien upon said claim and leasehold interest and ordering the proceeds of said sale applied to the payment of said judgment. .

3—That at the time John Wensel ceased working

upon said claim, to-wit: May 12, 1913, he had no right to a mechanic's lien upon said claim by reason of having ceased work thereon for a period of thirty days.

4—That the aforesaid lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, were good and valid mechanic's liens upon the aforesaid interests of the defendant, Angus McDougall, as said interest existed upon the 5th day of May, 1915, and the plaintiff, Jack Irvine, is entitled to a judgment against the defendant, Angus McDougall, upon the said claims, as follows:

Upon the claim of James Fox, for Six Hundred and Seventy-Five Dollars (\$675.00) with interest at eight per cent per annum from May 20, 1913; Two and 25-100 Dollars (\$2.25) filing fee; One Hundred Thirty-five Dollars (\$135.00) Attorney's fee:

Upon the claim of Donald Hayes, for Five Hundred Eighty-Five and 75-100 Dollars (\$585.75), with interest at eight per cent per annum from May 20, 1913; Two and 25-100 Dollars (\$2.25), filing fee; One Hundred and Seventeen Dollars '(\$117.00), attorney's fee:

Upon the claim of John Sully, for Two Hundred and Sixty-seven Dollars (\$267.00), with interest at eight per cent per annum from May 20, 1913; Two and 25-100 Dollars (\$2.25) filing fee; Fifty-four Dollars (\$54.00), attorney's fee:

Upon the claim of Tom King, for One Hundred and Sixty-five Dollars (\$165.00), with interest at

eight per cent per annum from May 20th, 1913; Two and 25-100 Dollars (\$2.25) filing fee; Thirty-three Dollars (\$33.00), attorney's fee:

Upon the claim of Henry Berks, for Six Hundred and Seventy-nine and 25-100 Dollars (\$679.25), with interest at eight per cent per annum from May 20th, 1913; Two and 25-100 Dollars (\$2.25) filing fee; One Hundred and Thirty-six Dollars '(\$136.00), attorney's fee:

And for a judgment foreclosing said liens, and each of them, and ordering the sale of said property to satisfy the aforesaid sums.

5—That the aforesaid lien claims of Jack Irvine, James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, are first liens upon the said interests of said Angus McDougall, and are superior to any right, title, interest, lien or claim of the defendants, J. A. Healy, Roy Rutherford and Geo. M. Smith.

DATED at Fairbanks, Alaska, this——day of October, 1915.

JUDGE.

Endorsed: Service of a copy of the within Plaintiff's Proposed Findings of Fact and Conclusions of Law is hereby admitted this 15th day of October, 1915.

CECIL H. CLEGG,

Atty. for Defendant J. A. Healy.

McGOWAN & CLARK,

Attys. for Defendants, Geo. M. Smith
and Roy Rutherford.

Filed in the District Court, Territory of Alaska, 4th Div., Oct. 15, 1915. J. E. Clark, Clerk, By L. F. Protzman, Deputy.

That upon the 28th day of October, 1915, the Court refused to sign said proposed findings of fact and conclusions of law to which refusal plaintiff then and there excepted. That upon the 20th day of October, 1915, plaintiff filed objections to the findings of fact and conclusions of law prepared consonant to the Courts decision in this case, and thereafter, on the 29th day of October, 1915 signed by the Court which said objections were in words and figures as follows:

[Title of Court and Cause.]

Objections to Findings of Fact and Conclusions of Law.

Comes now the above plaintiff, and referring to the Findings of Fact and Conclusions of Law prepared herein in consonance with the Court's decision of June 1st, 1915 and said findings and said conclusions are on file herein for the Courts signature, objects to findings of fact Nos. 28 and 29, for the reason that the same are contrary to the law and the evidence in this case.

Plaintiff further objects to Conclusions of Law No. 6, for the reason (a)—that said conclusion is based upon the erroneous state of facts, and (b)—that the said conclusion is not law, even if that alleged finding of fact upon which it is based were shown by

the evidence.

Plaintiff further objects to Conclusion of Law No. 7 for the reason that the same is based upon an erroneous Finding of Fact.

DATED at Fairbanks, Alaska, this 20th day of October, 1915.

HARRY E. PRATT

LOUIS K. PRATT

Attys. for Plaintiff.

Upon the 27th day of October, 1915, the Court overruled said objections, to which ruling plaintiff then and there excepted. Such exceptions were allowed.

Upon the 29th day of October, 1915, the Court signed and filed findings of fact and conclusions of law on file in this case. To the making and signing of which, the plaintiff, then and there, duly excepted for the reason that the findings of fact Nos. twenty-eight and twenty-nine, and conclusions of law, Nos. six and seven, were contrary to the law and the evidence in this case and the Court then and there allowed such exceptions.

That upon the 31st day of October, 1915, plaintiff filed herein his motion for a new trial which said motion was in words and figures, as follows:

[Title of Court and Cause.]

Motion for New Trial.

Comes now the above named plaintiff, and moves the Court for an order setting aside the findings of

fact and conclusions of law made and signed by this Court in the above entitled case, upon the 29th day of October, 1915, and for an order granting a new trial in this case, for the following reasons, to-wit:

1—That finding of fact number twenty-eight in the aforementioned findings of fact and conclusions of law is contrary and against the law and evidence adduced at the trial of this case.

2—That the portion of finding of fact number twenty-nine of the aforesaid findings which reads as follows, to-wit:

“29—That the aforesaid Tom King sold and assigned his said claim to the plaintiff, Jack Irvine, long after the commencement of this suit and the said Jack Irvine was not the owner and holder of said claim at the time of the commencement of this suit,”

is contrary and against the law and evidence adduced in the trial of this case and the evidence upon said trial was insufficient to warrant said finding number twenty-eight and the aforesaid portion of finding number twenty-nine.

3—That conclusion of law number six in the aforesaid findings of fact and conclusions of law, is contrary and against the law and evidence adduced upon the trial of this case and said evidence was insufficient to justify said finding.

4—That that portion of conclusion of law number seven of the aforesaid findings of fact and conclusions of law, which reads, as follows, to-wit:

"But plaintiff was not the assignee and owner of said lien claim of Tom King nor the debts secured thereby at the time of the commencement of this suit and therefore is not entitled to any judgment thereon,"

is contrary and against the evidence adduced upon the trial of this case and contrary to the law governing the same.

DATED at Fairbanks, Alaska, this 30th day of October, 1915.

HARRY E. PRATT

LOUIS K. PRATT

Attorneys for Plaintiff.

That thereafter and upon the 2nd day of November, 1915, said motion was submitted to the Court for its decision and by the Court, upon the 4th day of November, 1915, denied to which said denial the plaintiff then and there excepted and an exception was duly allowed. That thereafter and upon the 9th day of November, 1915, the Court made and filed his judgment and decree herein, to which said making and filing the plaintiff then and there excepted for the reason that the portions of said judgment and decree, which were in words and figures, as follows, to-wit:

"IT IS FURTHER ADJUDGED and DECREED that the aforesaid assigned claims of James Fox, Donald Hayes, John Wenzel, John Sully and Henry Berks, set forth in the second, third, fourth, fifth and seventh causes of action

respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and that the plaintiff shall take nothing thereby.

IT IS FURTHER ADJUDGED and DECREED that plaintiff take nothing by virtue of the assigned claim of Tom King set forth in the sixth cause of action of Plaintiff's amended complaint as further amended by interlineation."

are contrary to the law and evidence of this case, which said exceptions were by the Court duly allowed.

And now, the foregoing matters composing all of the testimony adduced at said trial, bearing directly or indirectly on the question of the assignment or the non-assignment of the claims of James Fox, Donald Hayes, John Sully, Henry Berks and Tom King, as set forth in plaintiff's amended complaint, as amended by interlineation in causes of action numbers two, three five, six and seven thereof, respectively, and in furtherance of justice and in order that the foregoing exceptions may become a part of the records of this case, and within the time allowed by law to prepare, serve, file, and have settled his bill of exceptions of this cause, the plaintiff herewith presents the foregoing bill of exceptions in the above entitled cause.

WHEREFORE plaintiff prays that the Court adjudge that the above and foregoing, constitutes in substance all of the evidence adduced upon the trial of this case in regard to the assignment or non-as-

signment of the aforesaid claims, and that the above and forgoing be settled, signed and allowed by the Judge of this Court in the manner prescribed by law, and made a part of the record of this case.

DATED at Fairbanks, Alaska, this 9th day of November, 1915.

HARRY E. PRATT

LOUIS K. PRATT

Attorneys for Plaintiff.

SERVICE of the foregoing bill of exceptions duly executed this 9th day of November, 1915.

CECIL H. CLEGG,

Atty, for Defendant J. A. Healy.

McGOWAN and CLARK,

Attys. for Defendants Geo. M. Smith
and Roy Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 9, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

Re-Filed in the District Court, Territory of Alaska, 4th Div. Nov. 18, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

BE IT REMEMBERED that on the 17th day of November, 1915, the above named plaintiff, Jack Irvine, presented his bill of exceptions to the above entitled Court for allowance and settlement, which said proposed bill of exceptions was served and filed

within the time allowed by law and which said bill of exceptions consists of the foregoing typewritten pages, numbered one to sixteen, inclusive.

Plaintiff appeared by Harry E. Pratt, one of his attorneys. Defendant J. A. Healy appeared by his attorney, Cecil H. Clegg; and defendants Geo. M. Smith and Roy Rutherford appeared by one of their attorneys, John A. Clark. It appears to the Court that the above appearing defendants have heretofore filed objections to said proposed bill of exceptions and suggested amendments thereto, and that a full hearing has been had upon said objections and proposed amendments.

Now upon this 18th day of November, 1915, it appearing to the Court that the aforesaid bill of exceptions has been made to conform to such of said objections as were sustained and that it contains all of the testimony, exhibits and evidence given by the respective parties upon the trial of this cause, pertaining to, material, or bearing upon the assignment or non-assignment of the claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, set forth in plaintiff's amended complaint, as further amended by interlineation in causes of action, two, three, five, six and seven, respectively, and all matters upon which the Court based his findings of fact with reference thereto; and

IT FURTHER APPEARING to the Court that all matters set forth in said bill of exceptions are, in all respects true and correct.

NOW THEREFORE IT IS HEREBY ORDERED & ADJUDGED that the foregoing typewritten pages, numbered one to sixteen, inclusive, be and the same are hereby approved, allowed and settled as the bill of exceptions in the above entitled matter and made to appear of record therein, and ordered filed as of this date:

IT IS FURTHER ORDERED AND ADJUDGED that the foregoing bill of exceptions contains all of the testimony, evidence, exhibits and proceedings had upon the trial of this cause with reference to the assignment or non-assignment of the claim of the aforesaid James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, set forth in plaintiff's amended complaint as further amended by interlineation in causes of action two, three, five, six and seven, respectively, and all matters upon which findings of fact number twenty-eight, conclusion of law number six, and those portions of finding of fact number twenty-nine, and conclusion number seven, objected to by plaintiff in this Court's findings of fact and conclusions of law and that said bill contains all matters necessary for an intelligent determination of the correctness of this Court's decision with reference to said assignments.

That the further matters set forth in said bill of exceptions are true and correct and that whenever an exception is therein noted by plaintiff, to any rulings of said Court, an exception was then and there duly allowed by the Court.

DATED at Fairbanks, Alaska, this 18th day of November, 1915.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 360.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 18, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause came on for trial before the Court in open session upon the 21st day of May, 1915, upon the amended complaint of plaintiff as further amended by interlineation; the answer of the defendant J. A. Healy, and the answer of the defendants Geo. M. Smith and Roy Rutherford; the plaintiff appeared in person and by Harry E. Pratt, one of his attorneys; the defendant J. A. Healy, appeared by his attorney, Cecil H. Clegg; and the defendants, Geo. M. Smith and Roy Rutherford, appeared by John A. Clark, one of their attorneys. The plaintiff introduced evidence in support of his case but the appearing defendants declined to introduce any so at the close of the case, the Court took the same under advisement and upon the 1st day of June, 1915, announced his decision, which was and is, as follows, to-wit:

FINDINGS OF FACT.

1—That the defendant, Angus McDougall was, at

Valdez, Alaska, upon the 17th day of October, 1913, duly and regualrly personally served with summons in this cause and was upon the 19th day of January, 1914, again duly and regularly served with summons in this cause, together with a copy of the amended complaint herein; That said defendant, Angus McDougall, made no appearance of any kind and upon the 17th day of May, 1915, his default herein was duly and regularly entered.

2—That the defendant, Angus McDougall, for all times mentioned herein, was one of the owners in common of that certain quartz mining claim in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, known as the Pioneer Quartz Mining claim, situate at the head of Fairbanks creek on the left limit thereof, on the divide between said creek and Wolf creek; That during said period, said Angus McDougall was also the owner of that certain leasehold interest in and to said claim made in writing upon the 25th day of May, 1912, by Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, the owners thereof, to Angus McDougall, wherein said claim was leased to said Angus McDougall for mining purposes for the period of ten years from June 1st, 1912, reserving to said owners, in payment for said lease, no rent for the first year thereof, but ten per cent of the gross output thereof for the second and third years and fifteen per cent for the remaining years thereof, which said lease was filed for record in the office of the

Commissioner and Exofficio Recorder of the Fairbanks Precinct, Territory of Alaska, upon the 2nd day of September, 1912 and recorded in Book No. 5 of Leases, page 337 and numbered instrument No. 37027.

3—That upon the 3rd day of February, 1913, the defendant, Angus McDougall hired plaintiff, Jack Irvine, to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 Dollars (\$5.50) per day and One Dollar (\$1.00) per hour for over-time; That pursuant to said hiring, plaintiff—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim Ninety-four (94) days and One Hundred and Ninety-seven (197) hours over-time, at no time ceasing work thereon for a period as long as thirty days; That the plaintiff has been paid nothing for said work and there is due and owing him from said defendant, Angus McDougall therefor, the sum of Seven Hundred and Fourteen Dollars (\$714.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of plaintiff was development work and the same did, in fact develop and improve said mining claim and leasehold interest.

4—That upon the 7th day of June, 1913, plaintiff filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of

said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

5—That plaintiff was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25), and was compelled to employ an attorney to foreclose his said lien. That a reasonable attorney's fee for the foreclosure of said lien is the sum of One Hundred and Forty-three Dollars (\$143.00).

6—That the said J. A. Healy, in an action in this Court, numbered herein 1907, and entitled J. A. Healy, plaintiff against Angus McDougall, Defendant, caused a writ of attachment to issue therein and upon the 13th day of May, 1913, levied the same upon the aforesaid mining claim.

7—That upon the 3rd day of June, 1913, said Angus McDougall made an assignment of the aforesaid claim and leasehold interest, among other property and subject to certain conditions to the defendants George M. Smith and Roy Rutherford, for the benefit of his creditors, which said assignment was filed for record upon the 18th day of June, 1913, and is recorded in the office of the Recorder of the

Fairbanks Precinct, Territory of Alaska in Volume 17 of Deeds page 449, Instrument No. 39019.

8—That upon the 18th day of January, 1913, the defendant, Angus McDougall hired James Fox to work upon the aforesaid claim, as a miner, at the rate of Five Dollars '(\$5.00) per day and One Dollar (\$1.00) per hour for overtime; That pursuant to said hiring, James Fox—between said day and the 11th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Ten (110) days and One Hundred and twenty-five (125) hours over-time, at no time ceasing work thereon for a period as long as thirty days; That James Fox was paid nothing for said work and there was due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Seventy-Five Dollars (\$675.00), over and above all counterclaims, credits and off-sets, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mntioned work of James Fox was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

9—That upon the 2nd day of June, 1913, James Fox filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract for said hiring; a statement of his afore-

said demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

10—That the cost of filing said lien claim of James Fox was the sum of Two and 25-100 Dollars (\$2.25).

11—That upon the 18th day of January, 1913, the defendant, Angus McDougall hired Donald Hayes to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 Dollars (\$5.50) per day; That pursuant to said hiring, Donald Hayes—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Six and one-half (106 1-2) days, at no time ceasing work thereon for a period as long as thirty days; That Donald Hayes was paid nothing for said work and there was due and owing from said defendant, Angus McDougall therefor, the sum of Five Hundred Eighty-five and 75-100 Dollars (\$585.75), over and above all counter-claims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of Donald Hayes was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

12—That upon the 2nd day of June, 1913, Donald Hayes filed in the office of the Recorder of the Fair-

banks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring; a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

13—That the cost of filing said lien claim of Donald Hayes was the sum of Two and 25-100 Dollars (\$2.25).

14—That upon the 9th day of December, 1912, the defendant, Angus McDougall hired John Wensel to work upon the aforesaid claim, at the rate of Five Dollars (\$5.00) per day; That pursuant to said hiring, John Wensel—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Twenty-six and a half (126 1-2) days; That there has been paid John Wensel for said work the sum of Fourteen Dollars (\$14.00) and no more, and there is due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Twenty-three and 50-100 Dollars (\$623.50), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; That all

of the above mentioned work of John Wensel, consisted of cooking for the men who were doing development work upon said claim and it was necessary for said men to have a cook in order that their services should not be taken from development work to cook their own meals.

15—That upon the 27th day of May, 1913, John Wensel filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said work.

16—That said John Wensel was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25).

17—That said John Wensel ceased working upon said claim entirely, for the full month of April, 1913.

18—That upon the 18th day of April, 1913, the defendant, Angus McDougall hired John Sully to work upon the aforesaid claim, at the rate of One and 50-100 Dollars (\$1.50) an hour; That pursuant to said hiring, John Sully—between said day and the 5th of May, 1913, the same being the last day

he worked thereon—worked upon said claim One Hundred and Seventy-eight (178) hours; That John Sully has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefor, the sum of Two Hundred and Sixty-seven Dollars (\$267.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20th, 1913; that all of the above mentioned work of John Sully was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

19—That upon the 27th day of May, 1913, John Sully filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of said hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

20—That John Sully was compelled to and did pay for the filing of said lien claim, the sum of Two and 25-100 Dollars (\$2.25).

21—That upon the 9th day of April, 1913, the defendant, Angus McDougall hired Tom King, to work

upon the aforesaid claim, as a miner, at the rate of Five Dollars (\$5) per day; That pursuant to said hiring, Tom King—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim Thirty-three (33) days; That Tom King has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefor, the sum of One Hundred and Sixty-five Dollars (\$165.00), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20, 1913; that all of the above mentioned work of Tom King was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

22—That upon the 28th day of May, 1913, Tom King filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold interest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

23—That Tom King was compelled to and did pay for the filing of said lien claim, the sum of Two

and 25-100 Dollars (\$2.25).

24—That upon the 28th day of December, 1912, the defendant, Angus McDougall, hired Henry Berks to work upon the aforesaid claim, as a miner, at the rate of Five and 50-100 (\$5.50) per day; That pursuant to said hiring, Henry Berks—between said day and the 12th day of May, 1913, the same being the last day he worked thereon—worked upon said claim One Hundred and Twenty-Three and a half (123 1-2) days, at no time ceasing work thereon for a period as long as thirty days; That Henry Berks has been paid nothing for said work and there is due and owing from said defendant, Angus McDougall therefor, the sum of Six Hundred and Seventy-nine and 25-100 Dollars '(\$679.25), over and above all counterclaims, credits and set-offs, with interest thereon at eight per cent per annum from May 20th, 1913; that all of the above mentioned work of Henry Berks was development work and the same did, in fact, develop and improve said mining claim and leasehold interest.

25—That upon the 7th day of June, 1913, Henry Berks filed in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, a statement sworn to by himself, containing the names of the owners of said claim and leasehold interest, the name of the person who hired him to work thereon, and the contract of hiring, a statement of his aforesaid demand, after deducting all just credits and set-offs; a description of said mining claim and leasehold in-

terest, sufficient for identification and claiming a Mechanic's Lien upon said claim and leasehold interest for the aforesaid amount, and interest, and describing his said development work.

26—That Henry Berks was compelled to and did pay for the filing of said lien claim the sum of Two and 25-100 Dollars (\$2.25).

27—That the aforesaid James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, sold and assigned their said claims against Angus McDougall, the defendant, to the plaintiff, Jack Irvine, and who is now the owner thereof and was at the time of the commencement of this suit.

28—That the aforesaid James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, sold and assigned their aforesaid claims against the said defendant, Angus McDougall to the plaintiff, Jack Irvine, upon the 20th day of May, 1913 and were not the owners of their said claims at the time they filed their lien statements as above mentioned.

29—That the aforesaid Tom King sold and assigned his said claim to the plaintiff, Jack Irvine, long after the commencement of this suit and the said Jack Irvine was not the owner and holder of said claim at the time of the commencement of this suit, although he now is.

CONCLUSIONS OF LAW.

1—That the plaintiff, Jack Irvine, has a good and valid mechanic's lien upon the interest of Angus McDougall in and to said mining claim and leasehold

interest to the extent that such interest existed upon the 3rd day of February, 1913, for the sum of Seven Hundred and Fourteen Dollars (\$714.00) with interest thereon from May 20, 1913, at eight per cent per annum; for the further sum of Two and 25-100 Dollars (\$2.25), expense of filing his said lien statement; for the further sum of One Hundred and Forty-three Dollars (\$143.00) as attorney's fees for the foreclosure of said lien and for the costs and disbursements of this suit.

2—That said Jack Irvine is entitled to a judgment against the said Angus McDougall for the above mentioned amounts and for the judgment foreclosing said mechanic's lien upon said claim and leasehold interest and ordering the proceeds of said sale applied to the payment of said judgment.

3—That the aforesaid lien of Jack Irvine is a first lien upon the said interests of said Angus McDougall and is superior to any right, title, interest, lien or claim of the defendants, J. A. Healy, Roy Rutherford and Geo. M. Smith.

4—That at the time John Wensel ceased working upon said claim, to-wit: May 12, 1913, he had no right to a mechanic's lien upon said claim by reason of having ceased work thereon for the period of thirty days.

5—That at the time James Fox, Donald Hayes, Tom King, John Sully and Henry Berks ceased work upon said claim, to-wit: May 12, 1913, they, and each of them had a right to a mechanic's lien upon

said claim and leasehold interest of Angus McDougall, for the payment of the respective amounts due them.

6—That the lien claims of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, were and are invalid and of no effect for the reason that said men sold and assigned their said claims upon which said liens were based, to the plaintiff, Jack Irvine, upon the 20th day of May, 1915, and said men were not the owners of said claims at the time they filed said lien statements, therefore the plaintiff is not entitled to any judgment for the amount of said assigned claims.

7—That the lien claim of said Tom King, as filed upon the 28th day of May, 1913, gave rise to a good, valid and sufficient mechanic's lien upon the aforesaid interests of defendant, McDougall, but plaintiff was not the assignee and owner of said lien claim of Tom King, nor the debt secured thereby at the time of the commencement of this suit, and therefore is not entitled to any judgment thereon.

DATED at Fairbanks, Alaska, this 29th day of October, 1915.

CHARLES E. BUNNELL,
Judge.

Entered in Court Journal No. 13, page 313.

Service of a copy of the within Findings of Fact and Conclusions of Law is hereby admitted this 15th

day of October, 1915.

Attorney for Plaintiff Jack Irvine.

CECIL H. CLEGG,

Attorney for Defendant J. A. Healy.

McGOWAN and CLARK,

Attorneys for defendants Geo. M. Smith
& Roy Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 15, 1915.. J. E. Clark, Clerk, by L. F. Protzman, Deputy.

[Title of Court and Cause.]

**Ruling on Objections to Findings of Fact and
Conclusions of Law.**

Now on this day, the hearing on the objections to proposed Findings of Facts and Conclusions of Law filed in the above entitled cause by plaintiff and defendants herein having been heard before the Court and submitted, the Court now finds, and

IT IS HEREBY ORDERED that plaintiff's objections as set forth in Paragraphs 1, 2 and 3 are hereby overruled, "Plaintiff's proposed Findings of Fact and Conclusions of Law" are refused.

Defendant's objections to plaintiff's findings of fact, Paragraphs 1, 2, 3, 4, 5, 7, 8, 10, 11, 13, 14, 16, 17, 19 and 20, are hereby overruled.

Defendants' sixth objection to plaintiff's tenth proposed Findings of Fact is hereby sustained as to the last word, second line, and the remainder of said

Finding.

Defendants' ninth objection to plaintiff's thirteenth proposed Finding of Fact is hereby sustained as to the last two lines of said Paragraph.

Defendants' twelfth objection to plaintiff's sixteenth proposed Finding of Fact is hereby sustained beginning with the word "and" in the third line and the balance of the paragraph.

Defendants' fifteenth objection to plaintiff's twentieth proposed Finding of Fact is hereby sustained beginning with the word "and" in the third line and the balance of the paragraph.

Defendant's eighteenth objection to plaintiff's twenty-third proposed Finding of Fact is hereby sustained with the word "and" in the third line and the balance of the paragraph.

The Court on its own motion, denies all of that portion contained in Paragraph 26 of plaintiff's proposed Findings of Fact, beginning with the word "and" in the third line to the end of the paragraph, and the same is hereby stricken.

As to defendant's objections to the proposed Conclusions of Law, Paragraphs 1, 2, 3 and 4 are hereby overruled.

CHARLES E. BUNNELL,
District Judge.

[Title of Court and Cause.]

Order Denying Plaintiff's Motion.

Now at this time, Messrs. Pratt & Pratt appearing

for and on behalf of plaintiff and Messrs. McGowan & Clark appearing for and on behalf of defendant, and plaintiff's motion for a new trial having previously been submitted to the Court for its decision, and the Court now having carefully considered the matter and being fully advised in the premises,

IT IS ORDERED that plaintiff's motion for a new trial be, and the same is, hereby denied.

CHARLES E. BUNNELL,
District Judge.

[Title of Court and Cause.]

Judgment and Decree.

WHEREAS this cause came on for trial before the Court in open session, upon the 21st day of May, 1915, upon the amended complaint of plaintiff as further amended by interlineation, the answer of defendant, J. A. Healy, the answer of the defendants Geo. M. Smith and Roy Rutherford to the amended complaint of plaintiff as further amended by interlineation. The plaintiff appeared in person and by Harry E. Pratt, one of his attorneys. The defendant J. A. Healy, appeared by Cecil H. Clegg, his attorney, the defendants Geo. M. Smith and Roy Rutherford, appeared by John A. Clark, one of their attorneys. After the introduction of all evidence and at the close of the case the Court took the same under advisement and on the 29th day of October, 1915, signed and filed his findings of fact and conclusions of law wherein he found and concluded

as follows, to-wit:

1—That the default of the defendant Angus McDougall had been duly and regularly entered and that the said defendant was indebted to the plaintiff Jack Irvine, upon the matters set forth in the first cause of action of plaintiff's amended complaint as further amended by interlineation in the sum of Seven Hundred and Fourteen Dollars with interest thereon at eight per cent per annum from May 20, 1913; in the further sum of Two Dollars and twenty-five cents and One Hundred and Forty-three Dollars, costs of filing and foreclosing the mechanic's lien in said first cause of action; for such further sums as were expended for costs in this suit.

2—That the plaintiff Jack Irvine had a good and valid mechanic's lien for the payment of the aforesaid amounts, by reason of the matters set forth in the aforesaid first cause of action, upon the interests of defendant, Angus McDougall as they existed upon the 3rd day of February, 1913, in and to that certain quartz mine in the Fairbanks Precinct, fourth judicial division, Territory of Alaska, known as the Pioneer Quartz Mining Claim and situated at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf creek, and in and to that certain lease upon said mining claim made upon the 25th day of May, 1912 by Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, the owners of said claim to Angus McDougall, wherein said claim was leased to said

McDougall for mining purposes for a period of ten years from June 1st, 1912, reserving to said makers no rent for the first year of said lease but ten per cent of the gross output of said mine for the second and third years, and fifteen per cent of said gross output for the remaining term of said lease, which was recorded upon the 2nd day of September, 1912, in the office of the Recorder of the Fairbanks Precinct, Alaska, in book 5 of Leases at page 337 and numbered Instrument No. 37027.

3—That the aforesaid mechanic's lien of plaintiff, set forth in the first cause of action, was a first lien upon said interests of said McDougall in said mining claim and leasehold interest and was superior to the right, title, interest, lien or claim of the defendants Healy and Rutherford and Smith, and that plaintiff was entitled to a judgment for said amounts against said McDougall, and for an order foreclosing said lien and ordering said property sold to satisfy said judgment.

4—That the assigned claims of James Fox, Donald Hays, John Wensel, John Sully and Henry Berkes, set forth in the second, third, fourth, fifth and seventh causes of action, respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and plaintiff was not entitled to recover anything thereon.

5—That the assigned claim of Tom King as set forth in the sixth cause of action of plaintiff's amended complaint, as further amended by interline-

ation, constituted a valid lien but that the plaintiff was not the owner thereof at the time of the commencement of this action.

NOW THEREFORE IT IS ORDERED, ADJUDGED and DECREED that the plaintiff, Jack Irvine, do, have and recover of and from the defendant Angus McDougall, the sum of Eight Hundred and Fifty-two Dollars: the further sums of Two Dollars and twenty-five cents, and One Hundred and Forty-three Dollars as filing and attorney's fees as aforesaid; and the further sum of..... Dollars, the costs of this action, to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED and DECREED that the aforementioned lien of plaintiff Jack Irvine, upon said interests of said Angus McDougall, in the said claim and leasehold interest as said interests appeared on the 3rd day of February, 1913, be and the same is hereby foreclosed, and it is ordered that the said interests in said claim and leasehold interest be sold according to law and the proceeds applied to the payment of the above sums.

IT IS FURTHER ADJUDGED and DECREED that the said lien of Jack Irvine, as designated above, and in his pleadings in this case, is a first lien upon said interests and superior and paramount to any right, title, interest, lien or claim of the defendants, Healy, Smith and Rutherford.

IT IS FURTHER ADJUDGED and DECREED that the aforesaid assigned claims of James Fox,

Donald Hays, John Wenzel, John Sully and Henry Berkes, set forth in the second, third, fourth, fifth and seventh causes of action respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and that the plaintiff shall take nothing thereby.

IT IS FURTHER ADJUDGED and DECREED that plaintiff take nothing by virtue of the assigned claim of Tom King set forth in the sixth cause of action of plaintiff's amended complaint as further amended by interlineation.

For all of which, let execution issue as provided by law.

DATED at Fairbanks, Alaska, this 9th day of November, 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13 page 334.

Received copy Nov. 6th, 1915.

CECIL H. CLEGG,
Atty. for Deft. Healy.

McGOWAN and CLARK,

Attys. for Defts. Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 9, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Order Substituting Attorneys.

Upon the motion of Harry E. Pratt, made in

open court, it is

ORDERED that the firm name of Louis K. Pratt & Son be withdrawn from the records of this court as attorneys in the above case and the names of Harry E. Pratt and Louis K. Pratt be substituted therefor.

DATED at Fairbanks, Alaska, this 12th day of October, 1915.

CHARLES E. BUNNEL,
District Judge.

Entered in Court Journal No. 13, Page 287.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Oct. 12, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Assignments of Error.

Comes now the above named plaintiff and alleges, that the findings of fact and conclusions of law and the decree entered in the above entitled case upon the 29th day of October, 1915, and the 9th day of November, 1915, respectively, are erroneous and unjust to the plaintiff, and he files with his petition on appeal, the following assignments of error upon which he will rely upon his said appeal, to-wit:

1—The Court erred in making finding of fact number twenty-eight, which was in words and figures, as follows:

“28—That the aforesaid James Fox, Donald Hayes, John Wensel, John Sully, and Henry

Berks, sold and assigned their aforesaid claims against the said defendant, Angus McDougall to the plaintiff, Jack Irvine, upon the 20th day of May, 1913 and were not the owners of their said claims at the time they filed their lien statements as above mentioned."

for the reason that said finding is contrary to the evidence adduced upon the trial of this case.

2—The Court erred in making that portion of finding of fact number twenty-nine, which was in words and figures as follows:

"29—That the aforesaid Tom King sold and assigned his said claims to the plaintiff, Jack Irvine, long after the commencement of this suit and the said Jack Irvine was not the owner and holder of said claim at the time of the commencement of this suit,"

for the reason that said portion of said finding is directly contrary to the evidence adduced at the trial of this case.

3—The Court erred in making conclusions of law number six of said conclusions of law, in words and figures as follows:

"6—That the lien claim of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, were and are invalid, and of no effect for the reason that said men sold and assigned their said claims upon which said liens were based, to the plaintiff, Jack Irvine, upon the 20th day of May, 1915, and said men were not the owners of

said claims at the time they filed said lien statements, therefore the plaintiff is not entitled to any judgment for the amount of said assigned claims."

for the reason that said conclusion is directly contrary to the law and evidence of the case, and is not based upon any finding of fact warranted by the evidence of the case: For the further reason that said conclusion of law is contrary to the law and inconsistent with the findings of fact made by the Court in this case.

4—The Court erred in making that portion of conclusion of law, number seven, which reads as follows:

"But plaintiff was not the assignee and owner of said lien claim of Tom King nor the debts secured thereby at the time of the commencement of this suit and therefore is not entitled to any judgment thereon."

for the reason that said portion is not based upon any finding of fact which is warranted by the evidence of this case, but the same is contrary to the law and evidence in this case.

5—The Court erred in refusing to sign plaintiff's proposed findings of fact.

6—The Court erred in failing and refusing to find that the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks set forth in the second, third, fifth, sixth and seventh causes of action of plaintiff's amended complaint, as further

amended by interlineation, were good and valid mechanic's liens, and that the same had been assigned to the plaintiff after the filing of the same in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, and before the commencement of this suit.

7—The Court erred in failing and refusing to enter judgment and decree declaring the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, set forth in the second, third, fifth, sixth and seventh causes of action respectively, good and valid liens owned by the plaintiff and ordering the same foreclosed and the property therein mentioned, sold to satisfy the sums mentioned in said causes of action.

8—The Court erred in over-ruling plaintiff's objections to findings of fact and conclusions of law, prepared consonant to the Court's decision and which said findings of fact and conclusions of law, were, by the Court, signed upon the 29th day of October, 1915.

9—The Court erred in denying plaintiff's motion for a new trial.

10—The Court erred in making that portion of its judgment and decree, which reads as follows:

"IT IS FURTHER ADJUDGED and DECREED that the aforesaid assigned claims of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, set forth in the second, third, fourth, fifth and seventh causes of action

respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and that plaintiff shall take nothing thereby."

for the reason that portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law warranted by the evidence in this case.

11—The Court erred in making that portion of its judgment and decree which reads, as follows:

"IT IS FURTHER ADJUDGED and DECREED that plaintiff take nothing by virtue of the assigned claim of Tom King set forth in the sixth cause of action of plaintiff's amended complaint as further amended by interlineation."

for the reason that said portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law justified by any law and evidence in this case.

12—The Court erred in failing and refusing to find that the lien claims of said James Fox, Donald Hayes, John Sully, Tom King and Henry Berks were valid first liens upon said property and superior to any right, title or lien of defendants J. A. Healy, Geo. M. Smith and Roy Rutherford and in refusing to so decree.

13—The Court erred in making and signing the judgment and decree entered herein.

WHEREFORE plaintiff prays that the judgment in the above entitled action be reversed and that the

Court be ordered to make findings of fact and conclusions of law in accordance with the law and the evidence of the case, and to base a decree thereon.

HARRY E. PRATT,

LOUIS K. PRATT,

Attorneys for plaintiff.

Due service of the foregoing assignments of error is hereby admitted this 17th day of November, 1915.

CECIL H. CLEGG,

Attorney for defendant, J. A. Healy.

McGOWAN and CLARK,

Attys. for Defs. Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Petition for Allowance of Appeal.

To the Honorable CHARLES E. BUNNELL, DISTRICT JUDGE:

The above named plaintiff, Jack Irvine, feeling that he is aggrieved by the decree made and entered in this case on the 9th day of November, 1915, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed, and that citation issue as provided by law, directing that said appeal be heard at San Francisco, Califor-

nia, fixing the amount of the appeal bond, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals setting at San Francisco, California.

Dated at Fairbanks, Alaska, this 17th day of November, 1915.

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Plaintiff.

Service of the foregoing Petition for Allowance of Appeal is hereby admitted at Fairbanks, Alaska, this 17th day of November, 1915.

CECIL H. CLEGG,
Atty. for defendant J. A. Healy.
McGOWAN and CLARK,

Attys. for defendants Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

**Order Allowing Appeal, Fixing Place of Hearing and
Fixing Amount of Appeal Bond.**

Now upon this 17th day of November, the same being one of the regular term days of this Court, this matter came on to be heard upon the petition of the plaintiff, Jack Irvine, for an appeal and fixing the place of hearing and the amount of the appeal bond and the Court, being advised in the premises;

IT IS ORDERED That said Jack Irvine's appeal in said matter to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby allowed, and that a certified transcript of the record, proceedings, orders, decree, testimony, and all other proceedings in said matter upon which said decree appealed from is based, duly authenticated, be transferred to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that said appeal be heard at San Francisco, California, and that the bond of Jack Irvine upon said appeal be fixed at the sum of Two hundred fifty dollars, to cover all costs and damages, if the appellant fail to make his plea good.

DATED at Fairbanks, Alaska, this 17th day of November, 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 360.

Service of the foregoing order allowing appeal and fixing place of hearing and fixing appeal bond by receipt of a true copy thereof, admitted this 17th day of November, 1915.

CECIL H. CLEGG,
Atty. for Defendant J. A. Healey.
McGOWAN and CLARK,

Attys. for Defendants Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: that we, Jack Irvine, plaintiff and appellant, as principal, and N. A. Shaw, as surety, are held and firmly bound unto Angus McDougall, J. A. Healy, Geo. M. Smith, and Roy Rutherford, defendants and appellees, in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said Angus McDougall, J. A. Healy, Geo. M. Smith and Roy Rutherford, defendants and appellees, their executors, administrators, heirs and assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, our executors, administrators, heirs and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of November, 1915.

WHEREAS the above named plaintiff, Jack Irvine, has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered upon the 9th day of November, 1915, in the above entitled action, by the District Court of the United States, for the Territory of Alaska, Fourth Judicial Division.

THEREFORE, the condition of this obligation is such, that if the above named plaintiff shall prosecute said appeal to effect and answer all costs and damages if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

JACK IRVINE,

Principal.

By HARRY E. PRATT,

His Attorney.

N. A. SHAW,

Surety.

United States of America,
Territory of Alaska,—ss:

N. A. SHAW, being first duly sworn on oath says: I am a resident of the Fairbanks Precinct, Territory of Alaska, and am the surety on the foregoing bond; and am worth the sum of Five Hundred Dollars, over and above all my just debts and liabilities in property not exempt from execution and situated within the Territory of Alaska.

N. A. SHAW.

Subscribed and sworn to before me this 17th day of November, 1915.

(Seal)

HARRY E. PRATT,

Notary Public in and for Alaska.

My commission expires June 24, 1916.

The foregoing bond and the sufficiency of the sureties thereon is hereby approved this 17th day of November, 1915.

CHARLES E. BUNNELL,

District Judge.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.

Citation.

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss:

THE PRESIDENT OF THE UNITED STATES, to
Angus McDougall; J. A. Healy and his attorney,
Cecil H. Clegg; Geo. M. Smith; and Roy Rutherford,
and their attorneys, McGowan & Clark.
GREETING:

YOU ARE HEREBY CITED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal entered and made in that certain case in the District Court, for the Territory of Alaska, Fourth Judicial Division, wherein Jack Irvine is plaintiff and appellant, and Angus McDougall, J. A. Healy, Geo. M. Smith and Roy Rutherford, are defendants and appellees, and numbered therein No. 1938, to show cause, if any there be, why the decree rendered against said plaintiff and appellant on the 9th day of November, 1915, as mentioned in said order allowing said appeal, should not be corrected, set aside and reversed, and why speedy justice should not be done to the plaintiff, appellant, Jack Irvine, in that behalf.

WITNESS the Honorable Edward Douglass White,
Chief Justice of the Supreme Court of the United

States, this 17th day of November, 1915.

CHARLES E. BUNNELL,

District Judge.

Service of the above and foregoing Citation by receipt of a copy thereof, is hereby admitted this 17th day of November, 1915.

CECIL H. CLEGG,

Atty. for Defendant J. A. Healy.

McGOWAN and CLARK,

Attys. for Defs. Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk.

[Title of Court and Cause.]

Order Enlarging Time to Docket Case.

Upon suggestion of plaintiff's attorneys that, by reason of the great distance between Fairbanks, Alaska, and San Francisco, California, and the uncertainty of mail service between these points, it would be impossible for the Clerk of this Court to forward the record in this case and deliver it to the Clerk of the Circuit Court of Appeals for the Ninth Circuit in San Francisco, within thirty days.

IT IS THEREFORE ORDERED that the time in which the record in this case shall be deposited with the said Clerk of the Circuit Court of Appeals for the Ninth Circuit in the city of San Francisco, state of California, be, and the same is hereby ex-

tended and enlarged to the 31st day of January, 1916.

CHARLES E. BUNNELL,

Judge of the District Court.

Entered in Court Journal No. 13, page 367.

Service of the foregoing Order by receipt of copy thereof admittd this 17th day of November, 1915.

CECIL H. CLEGG,

Atty. for Defendant J. A. Healy.

McGOWAN and CLARK,

Attys. for Defs. Smith & Rutherford.

Endorsed: Filed in the District Court, Territory of Alaska, 4th Div., Nov. 17, 1915. J. E. Clark, Clerk.

United States of America,

Territory of Alaska,

Fourth Division,—ss:

I, J. E. CLARK, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of ninety-two pages, numbered 1 to 92, inclusive, constitutes a full, true and correct transcript of the record on Appeal in cause No. 1938, entitled, Jack Irvine, Plaintiff and Appellant, vs. Angus McDougall, Thos. A. McGowan, John A. Clark, Dave Cascaden, J. A. Healey, Geo. M. Smith, John Kopitz and Roy Rutherford, Defendants and Appellees, and was made pursuant to and in accordance with the praecipe of the plaintiff and Appellant, filed in this action and made a part of this transcript, and by virtue of the Citation issued in said cause and is the return thereon in accordance

therewith.

And I do further certify that the Index thereof, consisting of page numbered i, is a correct Index of said Transcript of record; also that the costs of preparing said transcript and this certificate, amounting to Thirty-three and 95-100 Dollars (\$33.95), has been paid to me by counsel for plaintiff and Appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this 20th day of November, A. D. 1915.

(Seal)

J. E. CLARK,

Clerk of the District Court, Territory of Alaska,
Fourth Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK IRVINE,

Appellant,

vs.

ANGUS McDOUGALL, J. A. HEALY, GEORGE
M. SMITH and ROY RUTHERFORD,

Appelles.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.

Filed

MAY 19 1917

P. D. Anderson

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK IRVINE,

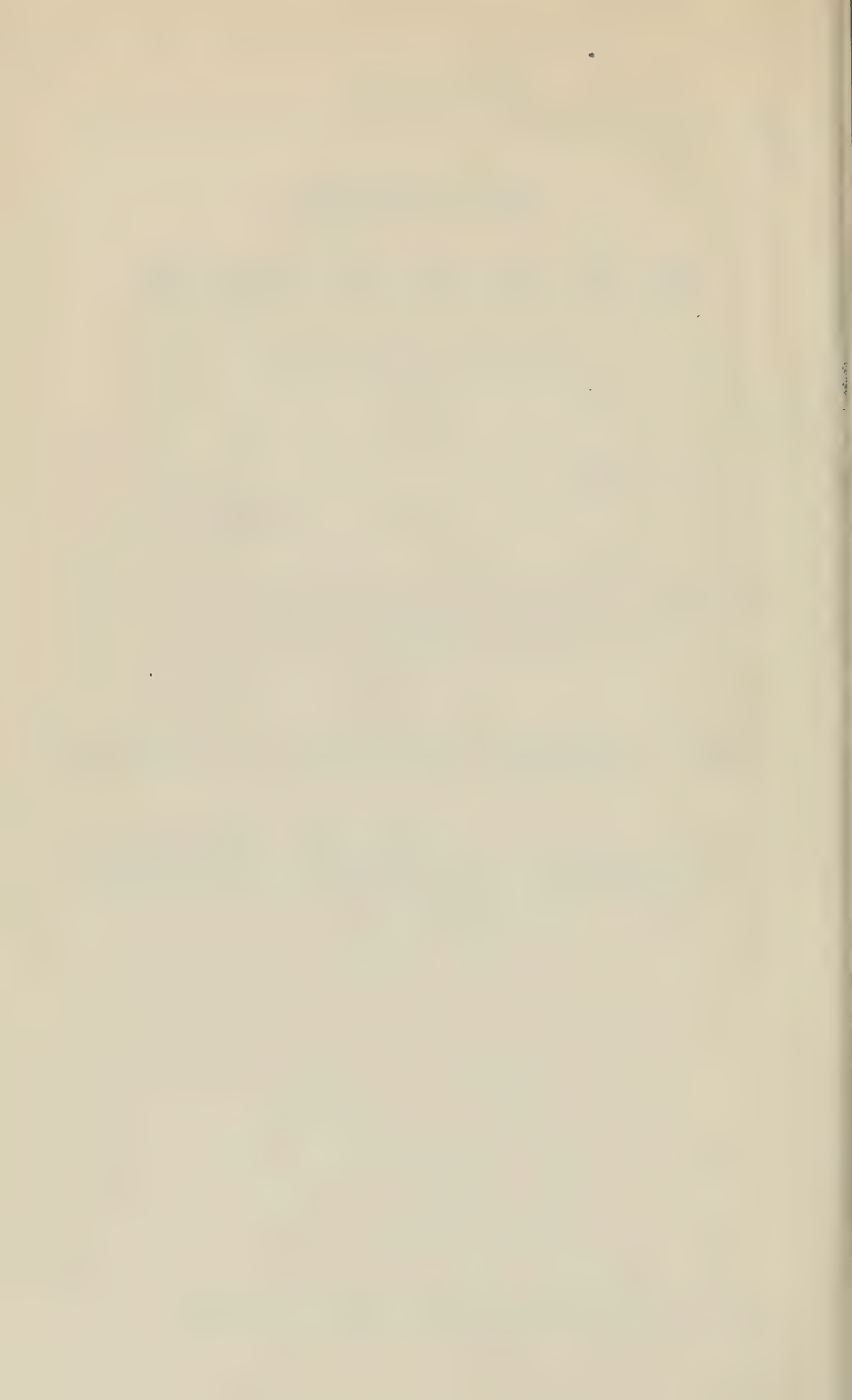
Appellant,

vs.

ANGUS McDOUGALL, J. A. HEALY, GEORGE
M. SMITH and ROY RUTHERFORD,
Appelles.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Fourth Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the twenty-ninth day of February, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2730.

JACK IRVINE,

Appellant,

vs.

ANGUS McDOUGALL et al.,

Appellees.

**Order Granting Petition for Order Requiring
Appellant to File Supplemental Transcript.**

On motion of Mr. Thomas A. McGowan, counsel for the appellees George M. Smith and Roy Rutherford, Trustees, and on consideration of the petition of counsel for the appellees, filed February 9, 1916, for an order requiring the appellant to file a supplemental transcript, which said petition was called for hearing this day in its regular order, as noticed, and there being no appearance in open court of counsel for the appellant and in opposition to the said petition, and good cause therefor appearing;

It is ORDERED that the said Petition be, and hereby is granted and that the clerk of the District

Court for the Territory of Alaska, Fourth Judicial Division, at the cost of the appellant, transmit to this Court, without delay, a certified Supplemental Transcript, containing a copy of the following papers, viz.:

(1) The Opinion of the District Court, filed in said cause on June 1, 1915; and

(2) Claims of Lien introduced in evidence in said cause at the trial thereof, theretofore filed in the office of the recorder of the Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, on behalf of James Fox, Donald Hayes, John Wensel, John Sully, Henry Berks, and Tom King, together with the endorsements thereon made by the recorder at the time said liens were filed.

I hereby certify that the foregoing is a full, true, and [1*] correct copy of an original order made and entered in the within entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-ninth day of February, A. D. 1916.

[Seal]

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

10¢ Doc. Stamp cancelled.

[Indorsed]: No. 2730. United States Circuit Court
of Appeals for the Ninth Circuit. Jack Irvine, Ap-

pellant, vs. Angus McDougall, et al., Appellees.
Certified Copy of Order Granting Petition for Order
Requiring Appellant to File Supplemental Tran-
script.

Service of the foregoing admitted this 24 March,
1916.

J. E. CLARK,
Clerk District Court,
By L. F. Protzman,
Deputy.

Filed in the District Court, Territory of Alaska,
4th Div. Mar. 24, 1916. J. E. Clark, Clerk. By
L. F. Protzman, Deputy. [2]

*In the District Court for the Territory of Alaska,
Fourth Judicial Division.*

No. 1938.

JACK IRVINE,

Plaintiff,

vs.

ANGUS McDOUGALL, THOMAS A. McGOWAN,
JOHN A. CLARK, DAVE CASCADEN, J. A.
HEALEY, GEO. M. SMITH, JOHN KO-
PITZV, and ROY RUTHERFORD,

Defendants.

Decision.

This is an action to foreclose laborers' liens upon
the Pioneer Quartz Mining Claim situate at the head
of Fairbanks Creek, in the Fairbanks Recording
Precinct, the plaintiff claiming a lien on behalf of

himself for labor performed in the development of said Pioneer Quartz Mining Claim, and also as the assignee of six other lien claimants.

The plaintiff alleges the performance of certain development work on the Pioneer Quartz Mining Claim under contract with the defendant McDougall; a compliance with the provisions of the statute entitling plaintiff to foreclose a lien for services rendered and the usual allegations in a complaint seeking foreclosure of a mechanics' lien. Similar allegations are made in the respective causes of action of the other six lien claimants and the further allegation of assignment by each lien claimant of his claim of lien to the plaintiff herein.

Plaintiff alleges that the owners of said mining claim on the 25th day of May, 1912, were Angus McDougall, Michael Hyland, who prior to the filing of the complaint herein sold his interest to David Cascaden, Thomas A. McGowan and J. A. Clark, who upon said date leased said claim to Angus McDougall for a period of ten years. That the defendant John A. Healey on the 12th day of May, 1913, caused a writ of attachment to issue against said [3] McDougall and levied the same upon said Pioneer Quartz Mining Claim. That on or about the 3d day of June, 1913, said McDougall made an assignment of certain property to Geo. M. Smith and Roy Rutherford for the benefit of his creditors assigning among other property his undivided interest in and to said Pioneer claim and leasehold interest therein. Plaintiff's complaint herein was filed in the court on

the 21st day of August, 1913. The defendants Smith, Rutherford and Healey have answered. The defendant McDougall is in default. From the record it appears that defendants McGowan, Clark, Cascaden and Kopits have not been served.

In the first place the Court calls attention to the second paragraph of the note to Title XII, page 276 of the Compiled Laws of Alaska.

“The safe and proper rule of construction of Mechanic’s Lien statutes is that while the remedial portions of these statutes should be liberally construed, with a view to avoid defeating the purpose of the statute, yet those parts upon which the right to the existence of a lien depend, being in derogation of the common law, should be strictly construed.

Morris v. Marsh (3 Alaska Rep. 144).”

Chapter 28 of the Compiled Laws of Alaska definitely sets forth what the claimant must do in order that he may have a lien. No liberal construction is permitted to be applied to the mandatory requirement of the statute that the claim of lien must be filed within the specified time, in order that it may become an actual lien instead of a claim and may charge the property with a special statutory liability.

The evidence shows that on the 20th day of May, 1913, the plaintiff, Irvine and five of the other claimants subscribed and swore to their respective Claims for Mechanic’s Liens; that the seventh claimant subscribed and swore to his Claim for Mechanic’s Lien

on the 28th day of May, 1913, and that it was filed for record in the office of the recorder for the Fairbanks Recording Precinct [4] on the same date. Irvine's claim was filed for record on the 7th of June, and the other claims were filed between the 27th of May and the 7th of June.

No lien exists until the Claim of Lien is filed as prescribed by statute. The provisions of the statute permit of no other construction. The statute plainly says to the claimant that if a special security is desired then the claimant must fully comply with the special provisions of the statute designed to afford such special security.

The evidence shows that all the claimants who assigned to Irvine, with the exception of one King, made such assignments prior to the time of filing their several claims with the recorder. The claimant King on cross-examination testified that he had made his assignment the day prior to May —, 1915, the date on which he testified in the trial of this case.

Plaintiff's Exhibit "I" introduced in evidence, reads as follows:

"For value received, I hereby assign and sell to Jack Irvine, my claim against Angus McDougall for work and labor performed upon the Pioneer Quartz Mining Claim at the head of Fairbanks Creek and also any and all rights

which I may have by virtue of having filed a mechanic's lien for said amount upon said claim.

JAMES FOX.

DONALD HAYES.

JOHN WENSEL.

JOHN H. SULLY.

HENRY BERKS.

TOM KING."

The evidence shows that at the time this instrument, which is not dated, was signed, the respective claimants, with the exception of King, had not filed their respective claims of lien, and therefore their liens as such were not assigned.

In each cause of action except the first in plaintiff's complaint it is alleged "that subsequent to the filing of said lien said (claimant) for a valuable consideration, assigned said claim [5] against said McDougall and all rights by virtue of having filed said lien, to the plaintiff, who is now the owner and holder thereof."

In the absence of any statute to the contrary the assignment of the claim before the perfection of lien destroys the right to lien.

56 N. W. 722; 35 N. E. 638; 25 Pac. 1070.

See, also, *Arndt v. Manger et al.*, No. 1858, records of this Court (Unreported).

It is stated in *Boisot on Mechanic's Liens*, sec. 10, as follows:

"In several of the states the statute expressly declares that mechanics' lien are assignable. Where this is the case, the question is, of course,

at rest, so far as that state is concerned. But where the statute says nothing on that subject, the question of assignability depends mainly upon the point whether or not the lien has been perfected by filing the claim before the assignment is made. In nearly all the states the person claiming the lien is obliged, in order to perfect it, to file a claim, verified by affidavit, showing, among other things, the amount that is due to him for labor or materials furnished by him. If he has assigned the account before he filed his claim, he cannot truthfully swear that there is anything due him, because the debt is then due, not to him but to his assigns. But his assignee cannot truthfully swear that he has either done work or furnished materials, and it is only to those who furnish either labor or materials, or both, that a lien is given. It follows, logically, from this reasoning, that a mechanic's lien, before being perfected by filing a claim, is not assignable; and a majority of the decisions so hold."

The mere right to a lien is not assignable;

7 N. W. 401; 32 N. W. 219; 41 Pac. 1103;

4 Oreg. 29; 57 N. E. 719; 90 N. E. 73; .

118 Pac. 103-113; 142 Pac. 785.

27 Cyc. 255-256.

Regarding the lien of Irvine, the plaintiff herein, the Court finds from the evidence that he has a valid lien on the property described, as alleged in the first cause of action, and that his lien is superior to the attachment of the defendant Healey.

In accordance with the views herein expressed, findings of fact, conclusions of law, judgment and decree may be prepared and submitted.

Dated this 1st day of June, 1915.

CHARLES E. BUNNELL,

District Judge. [6]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Jun. 1, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [7]

Claim [of James Fox] for Mechanic's Lien.

United States of America,
Territory of Alaska,—ss.

James Fox, being first duly sworn, on oath says: That on or about the 18th day of January, 1913, one Angus McDougall hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor, the sum of \$5 per day for each day of nine hours he worked thereon, and an additional dollar for each hour of overtime; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 11th, 1913, the same being the last day he worked thereon, he worked 110 days and an additional 125 hours as overtime, for which there is due and owing \$675, no part of which has been paid and he now claims a lien for said amount with interest from date at 8% per year, upon said

mining claim and also upon the leasehold interest hereinafter described of said Angus McDougall in said claim; that the above-mentioned time was put in wholly in running the engine in connection with sinking the main shaft, running tunnels, prospecting, etc., upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan, and John A. Clark, who, upon said date, executed a written lease to said Angus McDougall, upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden [8] has succeeded to the interest of Michael Hyland in said claim; that said first-mentioned owners and said Cascaden knew said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first-mentioned owners or Dave Cascaden post any notices negating liability for said work.

JAMES FOX.

Subscribed and sworn to before me this 20th day of May, 1913.

[Seal]

HARRY E. PRATT,
Notary Public in and for Alaska.

[Indorsed]: 38,934. Claim for Mechanic's Lien. James Fox. Territory of Alaska, Fourth Judicial Division,—ss. Filed for record at request of H. E. Pratt on the 2 day of June, 1913, at 45 min. past 2 P. M. and recorded in Vol. 1, of Liens, page 131, Fairbanks Recording District. John F. Dillon, Recorder. By C. E. Wright, Deputy.

#1938. Pltffs. Ex. "E." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy. [9]

Claim [of Donald Hayes] for Mechanic's Lien.

United States of America,
Territory of Alaska,—ss.

Donald Hayes, being first duly sworn, on oath says: That on or about the 18th day of January, 1913, one Angus McDougall hired him to work upon the Pioneer Quartz Mining claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor, the sum of \$5.50 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 106½ days, for which there is due and owing \$585.75, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8% per year, upon said mining claim and also upon the

leasehold interest hereinafter described of the said Angus McDougall, in said claim; that the above-mentioned time was put in wholly in doing development and improvement work upon said mine, to wit, sinking the main shaft, running tunnels, prospecting, etc., upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been, and now are, the same as above mentioned, except that one Dave [10] Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first-mentioned owners and said Cascaden knew that said McDougall was developing said claims under said lease, and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first-mentioned owners or Dave Cascaden post any notices negating liability for said work.

DONALD HAYES.

Subscribed and sworn to before me this 20th day of May, 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

[Indorsed]: 38,935. Claim for Mechanic's Lien. Donald Hayes. Territory of Alaska, Fourth Judi-

cial Division,—ss. Filed for record at request of H. E. Pratt on the 2 day of June, 1913, at 45 min. past 2 P. M., and recorded in Vol. 1 of Liens, page 131 Fairbanks Recording District. John F. Dillon, Recorder, by C. E. Wright, Deputy.

1938. Pltffs. Ex. "D." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy.
[11]

Claim [of John Wensel] for Mechanic's Lien].

United States of America,
Territory of Alaska,—ss.

John Wensel, being first duly sworn, on oath says: That on or about the 9th day of December, 1912, one Angus McDougall hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5 per day for each day he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12, 1913, the same being the last day he worked thereon he worked 126½ days, upon which he has been paid \$14, and there is still due, owing and unpaid therefor, the sum of \$623.50 for which amount, with interest thereon at 8% yearly from date hereof, he now claims a lien upon said mining claim and also upon

the leasehold interest, hereinafter described, of said Angus McDougall in said claim; that the above-mentioned time was put in wholly in cooking for the men sinking the main shaft, running tunnels and other development work on said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first-mentioned [12] owners and said Cascaden knew said McDougall was developing said claim under said lease and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first-mentioned owners or Dave Cascaden, post any notices negating liability for said work.

JOHN WENSEL.

Subscribed and sworn to before me this 20th day of May, 1913.

[Seal]

HARRY E. PRATT,
Notary Public in and for Alaska.

38,905. Claim for Mechanic's Lien. John Wensel. Territory of Alaska, Fourth Judicial Division,

—ss. Filed for record at request of H. E. Pratt on the 27th day of May, 1913, at 30 min. past 3 P. M., and recorded in Vol. 1 of Liens, page 129, Fairbanks Recording District. John F. Dillon, Recorder. By C. E. Wright, Deputy.

#1938. Pltffs. Ex. "C." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy.
[13]

Claim [of John Sully] for Mechanic's Lien.

United States of America,
Territory of Alaska,—ss.

John Sully, being first duly sworn on oath says; that on or about the 18th day of April, 1913, one Angus McDougall hired him to work, to build a meat cache, ore bunker and trestle approach thereto, upon the Pioneer Quartz Mining claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$1.50 per hour; that pursuant to said contract, this affiant, upon said date, commenced said work and completed it between said date and May 5th, 1913, the same being the last day he worked thereon, working thereon 178 hours, for which there is due, owing and unpaid the sum of \$267 for which this affiant now claims a lien for said amount with interest at 8% per annum from date hereof, upon said meat cache, ore bunker and trestle approach, together with sufficient ground surrounding same for his conve-

nient use; affiant also claims a lien for said amount upon said mining claim and also upon the leasehold interest, hereinafter described, of the said Angus McDougall in said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim, for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1913, the owners of said claim have been and now are the same as above mentioned, except that one Dave Cascaden has succeeded to the interest of Michael Hyland in said claim; that the said first-mentioned owners and said Dave Cascaden [14] knew said McDougall was developing said claim under said lease and knew said McDougall, with hired men, including this affiant was developing said mining claim as aforesaid and building said buildings but at no time posted any notices negating liability for said work.

JOHN H. SULLY.

Subscribed and sworn to before me this 20th day of May, 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

[Indorsed]: 38,904. Mechanic's Lien. John Sully. Territory of Alaska, Fourth Judicial Division, ss. Filed for Record at Request of H. E.

Pratt on the 27 day of May, 1913, at 30 min. past 3 P. M. and Recorded in Vol. 1. of Liens Page 128, Fairbanks, Recording District, John F. Dillon, Recorder. By C. E. Wright, Deputy.

#1938. Pltffs. Ex. "H." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915, J. E. Clark, Clerk. By P. R. Wagner, Deputy.
[15]

Claim [of Henry Berks] for Mechanic's Lien.

United States of America,
Territory of Alaska,—ss.

Henry Berks, being first duly sworn, on oath says: That or about the 28th day of December, 1912, one Angus McDougall hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said Creek and Wolf Creek, agreeing to pay him therefor, the sum of \$5.50 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days, and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 123½ days, for which there is due and owing \$679.25, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8% per year, upon said mining claim and also upon the lease-hold interest hereinafter described of the said Angus McDougall, in said claim; that the above-mentioned time was put in wholly doing development and im-

provement work upon said mine, to wit; sinking the main shaft, running tunnels, prospecting, etc., upon said claim.

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been, and now are, the same as above mentioned, except that one, Dave Cascaden, has [16] succeeded to the interest of Michael Hyland in said claim; that said first-mentioned owners and said Cascaden knew that said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men, including this affiant, was developing and improving said mine, as aforesaid, and at no time did said first-mentioned owners or Dave Cascaden post any notices negating liability for said work.

HENRY BERKS.

Subscribed and sworn to before me this 20th day of May, 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

[Indorsed]: 38,950. Claim for Mechanic's Lien. Henry Berks. Territory of Alaska, Fourth Judicial Division,—ss. Filed for Record at Request of H. E. Pratt on the 7 Day of June, 1913, at 30 Min.

Past 9 A. M. and Recorded in Vol. 1, of Liens page 133, Fairbanks Recording District, John F. Dillon, Recorder. By C. E. Wright, Deputy.

#1938. Pltffs. Ex. "F." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915, J. E. Clark, Clerk. By P. R. Wagner, Deputy.
[17]

Claim [of Thomas King] for Mechanic's Lien.

United States of America,
Territory of Alaska,—ss.

Thomas King, being first duly sworn, on oath says: That on or about the 9th day of April, 1913, one Angus McDougall hired him to work upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek on the left limit thereof, on the divide between said creek and Wolf Creek, agreeing to pay him therefor the sum of \$5 per day for each day of nine hours he worked thereon; that pursuant to said contract, this affiant, upon said date, commenced work upon said claim, at no time ceasing work for a period of thirty days and between said date and May 12th, 1913, the same being the last day he worked thereon, he worked 33 days, for which there is due and owing \$165, no part of which has been paid, and he now claims a lien for said amount with interest from date at 8% per year upon said mining claim and also upon the leasehold interest hereinafter described of said Angus McDougall in said claim; that the above-mentioned time was put wholly in development work in and

in connection with running tunnels, prospecting, etc., upon said claim;

That the owners of said mining claim, upon the 25th day of May, 1912, were Angus McDougall, Michael Hyland, Thomas A. McGowan and John A. Clark, who, upon said date, executed a written lease to the said Angus McDougall upon said mining claim for a period of ten years from June 1st, 1912, and said McDougall is now the owner of said leasehold interest; that for all times since said 25th day of May, 1912, the owners of said claim have been and now are the same as above mentioned, except that one, Dave Cascaden, has succeeded to the interest of Michael Hyland in said claim; that said first-mentioned owners and said Cascaden knew said McDougall was developing said claim under said lease, and knew that said McDougall, with hired men including this affiant, was [18] developing and improving said mine, as aforesaid, and at no time did said first mentioned owners or Dave Cascaden post any notices negating liability for said work.

TOM KING.

Subscribed and sworn to before me this 28th day of May, 1913.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

[Indorsed]: 38907. Claim for Mechanic's Lien. Thomas King. Territory of Alaska, Fourth Judicial Division,—ss. Filed for Record at Request of H. E. Pratt, on the 28 day of May, 1913, at 2 P. M.,

and Recorded in Vol. 1 of Liens, Page 130. Fairbanks Recording District, John F. Dillon, Recorder. By C. E. Wright, Deputy.

#1938. Pltffs. Ex. "G." Filed in the District Court, Territory of Alaska, 4th Div. May 21, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy. [19]

[Certificate of Clerk U. S. District Court to Supplemental Transcript of Record.]

*In the District Court for the Territory of Alaska,
Fourth Division.*

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, J. E. Clark, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of twenty pages, numbered 1 to 20, inclusive, consisting of a full, true and correct Supplemental Transcript of the record on appeal in cause No. 1938, entitled, Jack Irvine, Plaintiff and Appellant, vs. Angus McDougall, Thomas A. McGowan, John A. Clark, Dave Cascaden, J. A. Healey, Geo. M. Smith, John Kopitz and Roy Rutherford, Defendants, and Appellees, and was made pursuant to and in accordance with an Order of the United States Circuit Court of Appeals for the Ninth Circuit, made on the 29th day of February, 1916, filed in this action and made a part of this Transcript.

And I do further certify that the Index thereof, consisting of page numbered i, is a correct Index of said Transcript of Record; also that the costs of preparing said Supplemental Transcript and this certificate, amounting to Seven and 55/100 Dollars (\$7.55) has been paid to me by counsel for Plaintiff and Appellant in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 28th day of March, 1916.

[Seal]

J. E. CLARK,

Clerk of District Court, Territory of Alaska, Fourth Division. [20]

[Indorsed]: No. 2730. United States Circuit Court of Appeals for the Ninth Circuit. Jack Irvine, Appellant, vs. Angus McDougall, J. A. Healy, George M. Smith and Roy Rutherford, Appellees. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed April 17, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 220

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JACK IRVINE,

Appellant.

VS.

ANGUS Mc DOUGALL, J. A. HEALEY,
GEO. M. SMITH and ROY RUTHER-
FORD,

Appellees.

Appeal from United States District Court,
Territory of Alaska,
Fourth Division.

BRIEF ON BEHALF OF APPELLANT

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.

Filed

JAN 17 1916

F. D. Monckton,
Clerk.

No. _____

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK IRVINE,

Appellant.

VS.

ANGUS Mc'DOUGALL, J. A. HEALEY,
GEO. M. SMITH and ROY RUTHER-
FORD,

Appellees.

**Appeal from United States District Court,
Territory of Alaska,
Fourth Division.**

BRIEF ON BEHALF OF APPELLANT

Statement of the Case.

On the 1st day of August, 1913, appellant commenced an action in the Court below, wherein he asked for a money judgment against the defendant Angus McDougall on a cause of action in favor of himself and as assignee of several other persons, and also for the foreclosure of mechanics' liens as against all of the defendants. From and including December, 1912, to April, 1913, the defendant, Angus Mc-

Dougall, employed the appellant, Jack Irvine, and James Fox, Donald Hays, John Wensel, John H. Sully, Henry Berks and Tom King, to work for him as miners on his claim known as the Pioneer Quartz Mining Claim in the Fairbanks Precinct, Territory of Alaska. Plaintiff and the other men performed work and labor for McDougall for various lengths of time and earned different sums of money and in May, 1913, not being able to collect their wages, all filed mechanic's liens, under Chapter 28, Alaska Code (1913), against the mining ground and also against McDougall's leasehold interest therein.

McDougall made default, but the other defendants filed answers making some claims based upon an attachment lien and transfers by McDougall to two of them. The trial resulted in the Court making findings sustaining the mechanic's lien of appellant, but denying the validity of the liens of the other persons named above. See printed record, p. 69-82. With reference to the second, third, fifth, sixth and seventh causes of action stated in plaintiff's amended complaint, based upon the assigned claims of James Fox, Donald Hayes, John H. Sully, Henry Berks and Tom King, the decision of the Court was controlled by what he considered the evidence showed, viz: that those men had assigned their claims for wages to the appellant, Jack Irvine, before filing their mechanics' liens. The evidence in regard to the assignment of the mechanics' liens and when it took effect is all set forth in the bill of exceptions, com-

mencing at page 40 of the printed record and is all one way without even an attempt to create a conflict. The correctness of the Court's ruling depends upon the question of law as to when an assignment takes effect, that is to say, does it take effect when signed or when delivered to the assignee?

The findings of fact signed by the Court show sums of money due to the appellant on all of the assigned claims referred to in the amended complaint, and also finds that the persons named assigned their claims for wages to the appellant, but the conclusion of law and judgment are to the effect that the plaintiff and appellant take nothing upon the causes of action based on the assigned claims, that is in causes of action numbered two, three, four, five, six and seven. The plaintiff submitted findings of fact and conclusions of law, pursuant to Section 1063, p. 445, Alaska Code (1913), but they were rejected: See p. 46-60, printed record.

Assignments of Error.

Comes now the above named plaintiff and alleges, that the findings of fact and conclusions of law and the decree entered in the above entitled case upon the 29th day of October, 1915, and the 9th day of November, 1915, respectively, are erroneous and unjust to the plaintiff, and he files with his petition on appeal, the following assignments of error upon which he will rely upon his said appeal, to-wit:

1—The Court erred in making finding of fact

number twenty-eight, which was in words and figures, as follows:

“28—That the aforesaid James Fox, Donald Hayes, John Wensel, John Sully, and Henry Berks, sold and assigned their aforesaid claims against the said defendant, Angus McDougall to the plaintiff, Jack Irvine, upon the 20th day of May, 1913 and were not the owners of their said claims at the time they filed their lien statements as above mentioned.”

for the reason that said finding is contrary to the evidence adduced upon the trial of this case.

2—The Court erred in making that portion of finding of fact number twenty-nine, which was in words and figures as follows:

“29—That the aforesaid Tom King sold and assigned his said claims to the plaintiff, Jack Irvine, long after the commencement of this suit and the said Jack Irvine was not the owner and holder of said claim at the time of the commencement of this suit,”

for the reason that said portion of said finding is directly contrary to the evidence adduced at the trial of this case.

3—The Court erred in making conclusions of law number six of said conclusions of law, in words and figures as follows:

“6—That the lien claim of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, were and are invalid, and of no effect for

the reason that said men sold and assigned their said claims upon which said liens were based, to the plaintiff, Jack Irvine, upon the 20th day of May, 1915, and said men were not the owners of said claims at the time they filed said lien statements, therefore the plaintiff is not entitled to any judgment for the amount of said assigned claims."

for the reason that said conclusion is directly contrary to the law and evidence of the case, and is not based upon any finding of fact warranted by the evidence of the case: For the further reason that said conclusion of law is contrary to the law and inconsistent with the findings of fact made by the Court in this case.

4—The Court erred in making that portion of conclusion of law, number seven, which reads as follows:

"But plaintiff was not the assignee and owner of said lien claim of Tom King nor the debts secured thereby at the time of the commencement of this suit and therefore is not entitled to any judgment thereon."

for the reason that said portion is not based upon any finding of fact which is warranted by the evidence of this case, but the same is contrary to the law and evidence in this case.

5—The Court erred in refusing to sign plaintiff's proposed findings of fact.

6—The Court erred in failing and refusing to find

that the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks set forth in the second, third, fifth, sixth and seventh causes of action of plaintiff's amended complaint, as further amended by interlineation, were good and valid mechanic's liens, and that the same had been assigned to the plaintiff after the filing of the same in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, and before the commencement of this suit.

7—The Court erred in failing and refusing to enter judgment and decree declaring the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, set forth in the second, third, fifth, sixth and seventh causes of action respectively, good and valid liens owned by the plaintiff and ordering the same foreclosed and the property therein mentioned, sold to satisfy the sums mentioned in said causes of action.

8—The Court erred in over-ruling plaintiff's objections to findings of fact and conclusions of law, prepared consonant to the Court's decision and which said findings of fact and conclusions of law, were by the Court, signed upon the 29th day of October, 1915.

9.—The Court erred in denying plaintiff's motion for a new trial.

10—The Court erred in making that portion of its judgment and decree, which reads as follows:

“IT IS FURTHER ADJUDGED and DE-

CREED that the aforesaid assigned claims of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, set forth in the second, third, fourth, fifth and seventh causes of action respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and that plaintiff shall take nothing thereby."

for the reason that portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law warranted by the evidence in this case.

11—The Court erred in making that portion of its judgment and decree which reads, as follows:

"IT IS FURTHER ADJUDGED and DECREED that plaintiff take nothing by virtue of the assigned claim of Tom King set forth in the sixth cause of action of plaintiff's amended complaint as further amended by interlineation."

for the reason that said portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law justified by any law and evidence in this case.

12—The Court erred in failing and refusing to find that the lien claims of said James Fox, Donald Hayes, John Sully, Tom King and Henry Berks were valid first liens upon said property and superior to any right, title or lien of defendants J. A. Healy, Geo. M. Smith and Roy Rutherford and in refusing to so decree.

13—The Court erred in making and signing the judgment and decree entered herein.

WHEREFORE plaintiff prays that the judgment in the above entitled action be reversed and that the Court be ordered to make findings of fact and conclusions of law in accordance with the law and the evidence of the case, and to base a decree thereon.

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.

Brief and Argument.

The case hinged upon the question as to whether or not the assignment of the claims for labor and mechanics' liens (a copy of which is found at page 41 of the printed record), took effect on the day it was signed, to-wit: May 20, 1913, or whether it became effective when delivered to the plaintiff and appellant at a later date.

The facts on this subject will be found from pages 40 to 45, inclusive, of the printed record, and show conclusively that the assignors, James Fox, Donald Hayes, John Wensel, John H. Sully, Henry Berks and Tom King made out their mechanics' lien statements on that day and verified them before Harry E. Pratt, and that all of them, except Tom King, on the same day signed a written assignment of their claims and "also any and all rights which I may have by virtue of **having filed** a mechanic's lien, etc." Harry E. Pratt testified that after he had made out the me-

chanics' liens for these men, including the appellant, on the 20th day of May, 1913, he prepared the assignment, but was instructed by the assignors not to deliver the same to Mr. Irvine until after their mechanics' liens had been duly filed; that he complied with their instructions in all respects, and after the mechanics' liens had been filed and before the suit was commenced by appellant, he formally delivered the paper containing the assignment to Irvine; that up to that time the said paper had been in his possession as the agent of the assignors, with instructions when to deliver, and that he had followed the instructions. Irvine, the appellant, testified to the effect that shortly after the liens were filed and before the suit was commenced, the assignment was turned over to him. This was all the evidence there was on the subject from any source.

We insist that the assignment of the claims of those laborers to the plaintiff and appellant, did not take effect until the same was delivered to Irvine by Harry E. Pratt, which was after the liens were filed and before the suit was commenced. No doubt it is the law that if a laborer assigns his claim for wages, he cannot afterwards file a valid mechanic's lien to secure the debt, but here that rule of law was distinctly in mind and was conformed to literally. It is elementary that a written assignment or any other legal paper, does not become effective until it is delivered to the assignee or grantee and accepted. The wording of the assignment itself shows that the assignors

intended that it should take effect after the liens were

BITTER v. STEVENSON, 7 Cal. 388;

GOVIN v. DE MIRANDA, 27 N. Y. Sup. 1049;

NIXON v. JOSHUA HUMBY IRON WORKS, (Ore.) 99 Pac. 11.

this was a plain error.

2 Am. & Eng. Enc. of Law, p. 1061.

In Tom King's case, which is made the subject of the sixth cause of action, no formal written assignment was made in the first instance, but only a verbal one, after which, however, and after the action was commenced, he signed the same written assignment that the other men had already executed. That a parol assignment of such a claim and the mechanic's lien based thereon is good, we cite:

McFeron vs. Donnes (Ore.) 116 Pac., p. 1063.

The findings are to the effect that the assigned claims for labor represent unpaid bills due those men and that at the time of the trial they were valid debts against defendant McDougall, were unpaid and owned by appellant, Jack Irvine, but the Court, because he held against the validity of the mechanics' liens of the assignors, refused to enter any judgment for money in favor of the plaintiff on the other causes of action set forth in his complaint. This was wholly wrong because, even though the mechanics' liens—the incident—might fail, yet his complaint stated a good cause of action for money against McDougall with

reference to these assigned claims and judgment should have been entered in appellant's favor against McDougall for the money demanded, for each of the causes of action based on the assignments.

Section 1, Lord's Code of Civil Procedure, (Ore.), reads:

"The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs."

Section 833, Alaska Code (1913), reads as follows:

"The distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished and there shall be but one form of action for the enforcement of protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

It seems evident from this that the codifiers of the Alaska Code intended to wipe out of existence all of the technical distinctions between actions at law and suits in equity, and intended that a plaintiff might set out his facts in his complaint, whether such facts were of a legal or equitable nature or both, and might have such relief as the pleadings and proofs might warrant. The language of the Alaska Code is entirely different from that of Oregon, but is substantially the same as most of the Western States,

including Montana and California.

In *Russell vs. Hayner*, 130 Fed., p. 90, this Court held that where, in a suit to foreclose a mechanic's lien, the plaintiff failed to establish his lien, no judgment for money could be taken. This must have been said upon the theory that the plaintiff, having an adequate remedy at law, must go into a law Court, that is, he must commence a new action to get a judgment for the money due him, merely because, in trying to collect a debt secured by a mechanic's lien, he failed for some reason, technical or otherwise, to get a decree foreclosing his lien.

In a later case in the same Court (*Madden vs. Mc-*

FISH V. FIRST NAT'L BANK OF SEATTLE, WASH.,
180 Fed. Rep. 524;

WASKEY V. M'NAUGHT, 183 Fed. Rep. 929;

HECKER V. SUPERIOR COURT, 181 Cal., 317.

Madden vs. McKenzie overrules the case of *Russell vs. Hayner*, but in any event we respectfully ask the Court to re-examine this question.

The Oregon Supreme Court, in *Beacannon vs. Liebe* (5 Pac. Rep., p 273), said that there was no very good reason for holding to the distinction between actions at law and suits in equity, especially where the result would be that a plaintiff having a perfectly good cause of action at law stated, could not take a judgment for money, '(for example to foreclose a lien and such lien was not established at

the trial), yet they said that the practice had become so firmly intrenched in Oregon that they would have to adhere to it anyhow.

Ming Yue et al. vs. Coos Bay Ry. Co. (Ore.),
33 Pac., p. 641.

The third paragraph of Section 699, page 342, Alaska Code (1913) reads:

“In all actions to enforce any liens created by this chapter all persons PERSONALLY LIABLE and all lien holders whose claims have been filed for record under the provisions of Section 695, shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien, may be made parties.”

If a personal judgment may not be taken against those personally liable, where the mechanic's lien feature of the plaintiff's case fails, why does the Code require that such persons be made parties defendant? The contractor is personally liable and is a necessary party defendant, notwithstanding he has nothing whatever to do or to say, with reference to the validity of the mechanics' liens involved. Even the Supreme Court of Oregon seems to recognize that, under this section or for some other reason, a personal judgment for money may be taken in a mechanic's lien case.

Hand Mfg. Co. vs. Marks et al. (Ore.), 52
Pac., 512.

Western Plumbing Co. vs. Fried (Mont.), 81

Pac., 394.

Schindler vs. Green et al. (Calif.), 82 Pac., 631.

Wyman vs. Quayle (Wyo.), 63 Pac., 988.

13 Enc. Pldg. & Prac., p. 1037, and notes.

Respectfully submitted,

HARRY E. PRATT,

LOUIS K. PRATT,

Attorneys for Appellant.

No. ... 2730.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

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Appellant,

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ANGUS McDOUGALL, J. A. HEALEY,

GEO. M. SMITH and ROY RUTHER-
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Appellees.

Appeal from United States District Court, Territory
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BRIEF ON BEHALF OF APPELLEES

CECIL H. CLEGG,

Attorney for Appellant John A. Healey.

McGOWAN & CLARK,

THOS. A. McGOWAN,

JOHN A. CLARK,

Attorneys for Appellees Rutherford
and Smith, Trustees.

Filed

FEB 3 - 1916

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Appellant.

Appellees.

**Appeal from United States District Court, Territory
of Alaska, Fourth Division.**

BRIEF ON BEHALF OF APPELLEES

Statement of the Case.

This suit was commenced by plaintiff in his own behalf and as the assignee of the claims of six others, to foreclose certain alleged mechanics' liens upon certain mining property described in the complaint, under the provisions of chapter 28 of the Compiled Laws of Alaska.

The answer of appearing defendants denied all the allegations of the complaint and the fact of the assignment to plaintiff of each of the liens sought to be

foreclosed. At the trial the Court sustained the lien of plaintiff in full and for attorney's fees, but found for the defendants as to the six succeeding causes of action set forth in the complaint.

The evidence on the part of plaintiff and the pleadings were to the effect that claimants were all laborers, except Wensel, who was a cook, Sully, who was a carpenter, and Fox, who was an engineer, and that, on the 20th day of May, 1913, they (with the exception of King, who assigned his claim the day before the trial) assigned their claims for wages to plaintiff and all rights they had by virtue of having filed a lien; that none of them had filed any lien notice at that time, and that all the lien notices were later and subsequent to the 20th day of May, 1913, filed for record by Harry E. Pratt, one of the attorneys for plaintiff. Defendants introduced no evidence.

The liens of the five claimants other than plaintiff and King were denied by the Court, upon the ground that said claimants assigned their claims to the plaintiff at a time prior to the perfection of the liens claimed, by the filing of the lien notices with the Recorder of the Fairbanks Precinct, wherein the property sought to be charged with the liens is and was situate (Findings 28 and 29. Transcript p. 80) and rejected King's claim because it was not assigned before suit was filed.

Neither Sully nor Berks testified in the case, nor were they present at the trial.

The defendant Healy is a prior attaching creditor. Defendants Rutherford and Smith are trustees for the benefit of all creditors, including lien claimants.

Argument.

As to the claim of King, there is no assignment of error made by the appellant with reference to the Court's action, although it is contended in the brief of appellant that the action of the Court is erroneous with reference thereto, for the reason, as he states, that the claimant King made an oral assignment of his lien to plaintiff prior to the filing thereof. (Transcript, p. 45.)

It is seen by the record referred to that, in the statement to the Court by Mr. Pratt, one of the attorneys for plaintiff, he claims that Mr. King made an oral assignment of King's claim and lien to take effect as soon as the lien was filed. This is at variance with the allegations of his complaint, and there is no testimony anywhere else in the record, by Irvine or King, to this effect, and an unverified and unsupported statement of the attorney for plaintiff will surely not be considered of such weight as would justify this Court in holding that the trial Court erred in deciding that point as he did, especially when the plaintiff's own witnesses disprove the allegations of the complaint and no request was made to amend the complaint or to frame any issue upon any other theory than a written assignment by said King.

It is clearly shown by the testimony on cross-examination of the witnesses Fox and Hayes that the assignment of the claim of Fox, Hayes, Wensel, Sully, and Berks was made on the 20th day of May, 1913; that the signatures of all the claimants, except King, were placed to the assignment on the same day; that this was the same day that the liens were drawn, sworn, and subscribed to by the various claimants; and that this was prior to the time when the lien notices were filed for record—the lien notices of Fox and Hayes having been so filed on June 2nd, 1913, Wensel's and Sully's on the 27th of May, 1913, and Berks' on the 7th of June, 1913.

The undated written assignment introduced in evidence (Transcript p. 41) indicates that these claimants attempted in this instrument, made on the 20th day of May, 1913, to assign to plaintiff their rights to liens on the property; but such attempted assignment at that time could not carry the liens with it. The evidence further shows that, when the lien notices were signed and sworn to, they were left in the possession of one of the plaintiff's attorneys; that he himself filed them for record (as shown by endorsements of the seven original exhibits), and by Mr. Pratt's statement it is shown that they remained thereafter in his possession to the date of the trial and were never really delivered to the plaintiff Irvine or anybody else. (Transcript, statement of Mr. Pratt, p. 45.)

As to these liens, the Court denied them on the

ground that they assigned their claims, upon which the alleged liens are based, to plaintiff prior to the date of their filing for record, the Court properly and correctly holding that no lien exists until the notice of lien is filed as prescribed by statute.

That a mechanic's lien, under our Code, is merely an inchoate right on the part of the claimant, which may ripen into a perfected lien by the filing thereof, has been well settled by the adjudicated cases. The statute says in effect: "You may have a lien, provided you comply with the mandate of the statute."

25 Pac. 1070.

32 Pac. 169.

37 Pac. 626.

7 N. W. 401.

No assignment of the claims for money due could carry with it the right on the part of plaintiff to perfect these liens, the right to a lien being a personal one. The mere right to a lien is not assignable.

7 N. W. 401.

4 Ore. 29.

118 Pac. 103-113.

27 Cyc. 255-256.

32 N. W. 219.

87 N. E. 718-19.

142 Pac. 785.

41 Pac. 1103.

90 N. E. 73.

The assignment of the claims before the perfection of the liens by filing with the Recorder destroys

the right to a lien.

56 N. W. 722.

35 N. E. 638.

25 Pac. 1070.

Boisot, Mechanic's Liens, sec. 10.

Having assigned their claims prior to the filing of the lien notices, the notices when filed did not contain a true statement as to the person to whom the money was due, and in this respect the statements contained in the lien notices to that effect when filed were false.

II.

No issue was raised in the Court below as to personal judgment against McDougal. It was not asked for nor suggested to the Court. It is not made the basis of any proposed finding of fact or conclusion of law submitted by plaintiff, nor is it the subject of any assignment of error; therefore, if it was error, the fault lies with appellant and not with the Court nor with the answering defendants. (Par. 4, Rule 24, Circuit Court of Appeals, Ninth Circuit.)

That it was not error has already been decided by this Court in *Russel vs. Hayner*, 130 Fed. p. 90, cited by appellant.

Appellant entirely disregards new equity rule No. 71 and did not serve the praecipe for the transcript upon attorneys for appellees, who had no opportunity to insist upon the printed transcript containing all the evidence necessary to enable this Court to pass upon the point involved. There was omit-

ted from the transcript the written opinion filed by the trial Court in deciding the case at bar, although section 3 of rule 62 of the Rules of the District Court for the Fourth Judicial Division of the Territory of Alaska contains the following provision relative to writs of error, appeals, etc.: "3. He (appellant or plaintiff in error) shall also make and annex to the record and transmit a copy of any opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the Court to the jury." A certified copy of which rule we beg leave to file herewith, and which rule is printed in the appendix to this brief. Appellant also omitted from the record the original lien notices filed as exhibits in this cause at the trial thereof, the endorsements upon which show that the original lien claimants did not file their alleged liens for record, but all said liens were filed by Harry E. Pratt, the attorney for the lien claimants and attorney for the plaintiff in this action, and we likewise append hereto a copy of a certificate of the clerk of the District Court, in whose custody said exhibits are lodged, showing the facts to be as alleged, the original certificate being filed herewith.

The Hon. Charles E. Bunnell, the trial Judge before whom the cause was heard, on the first day of June, 1915, filed his written opinion in the Court below, wherein he considered and passed upon the merits of the case and expressly found that all the assignments of claims to plaintiff were made prior to the filing thereof, with the exception of that of

King, who did not assign his claim until the day before the trial of the case, more than a year and a half after the suit was instituted. A copy of which said opinion is set forth in the appendix hereto, and a certified copy of the same is lodged with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Attorneys for appellees have filed a motion in this Court to require the appellant to file a supplemental transcript, containing the exhibits above referred to and the written opinion of the trial Judge filed in this cause, but to avoid delay have attempted, at their own expense, to correct the error on the part of the appellant, by furnishing such information as would be supplied by the supplemental transcript by an appendix hereto, containing copies of certified copies and of certain certificates lodged with the clerk of this Court.

Elsewhere in this brief we have referred to the exhibits in the case and the endorsements thereon, although these are not part of the transcript now on file, as above explained, and we crave the Court's indulgence in this respect, as such statements are based upon our anticipation of favorable action by the Court upon our motion for a supplemental transcript or the Court's acceptance of the appendix hereto in lien thereof.

Appellees contend that there is but one question involved, i. e.: Were the claims for liens assigned to plaintiff by the respective claimants before they were

filed? If any conflict of testimony existed (and we contend that there is no conflict), the trial Court found as a matter of fact that they were so assigned prior to the filing thereof, and thus a question of law does not arise, as appellant's counsel impliedly, if not expressly, admit that, if such was the case, the right to a lien was lost. We submit that the trial Court was not in error, as contended by appellant, and that the judgment, so far as it is in favor of defendants, should be affirmed.

Respectfully submitted.

CECIL H. CLEGG,

Attorney for Appellee John A. Healy.

McGOWAN & CLARK,

THOS. A. McGOWAN,

JOHN A. CLARK,

Attorneys for Appellees Rutherford and
Smith, Trustees.

APPENDIX A.

In the District Court, Territory of Alaska, Fourth Division.

RULE 62.—WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. Whenever any writ of error shall be directed to this Court the Clerk thereof shall immediately make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the Court.

2. In all cases taken to the Appellate Court by

writ of error or appeal to review any judgment or decree, the Clerk of this Court shall annex to and transmit with the record the original writ of error and citation or citations, issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. He shall also make and annex to the record and transmit a copy of any opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the Court to the jury.

4. The record prepared shall be complete, containing in itself, and not by reference, all the papers, exhibits, depositions, and all other proceedings in the action.

5. Whenever, in the opinion of the Judge of this Court, it shall seem necessary or proper that original papers of any kind shall be inspected by the Appellate Court upon writ of error or appeal, he shall make such rule or order for the safe-keeping, transporting and return of such original paper as to him may seem proper.

6. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time and be served before the return day.

7. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty, Rule 52 of the Supreme Court.

8. Whenever it is necessary to attach any document, paper, testimony or other proceeding in a foreign language to the record on appeal or writ of error, the Clerk of this Court shall cause a correct translation thereof to be made and forwarded with

the original document.

(Rule 14 U. S. Circuit Court of Appeals, Ninth Circuit.)

United States of America, Territory of Alaska,
Fourth Division,—ss:

I, J. E. Clark, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the above and foregoing is a full, true and complete copy, and the whole thereof of Rule 62, on page 24 of the Rules of the United States District Court for the District of Alaska, Fourth Division.

In witness whereof, I have hereunto set my hand and affixed the seal of this Court at Fairbanks, Alaska, this 10th day of January, 1916.

(SEAL))

J. E. CLARK,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

APPENDIX B.

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

Jack Irvine, Plaintiff, vs. Angus McDougall, Thomas A. McGowan, John A. Clark, Dave Cascaden, J. A. Healey, Geo. M. Smith, John Kopitzv, and Roy Rutherford, Defendants.

NO. 1938.—DECISION.

This is an action to foreclose laborers' liens upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek, in the Fairbanks Recording Precinct, the plaintiff claiming a lien on behalf of himself for labor performed in the development of said Pioneer Quartz Mining Claim, and also as the assignee of six other lien claimants.

The plaintiff alleges the performance of certain

development work on the Pioneer Quartz Mining Claim under contract with the defendant McDougall; a compliance with the provisions of the statute entitling plaintiff to foreclose a lien for services rendered and the usual allegations in a complaint seeking foreclosure if a Mechanics' Lien. Similar allegations are made in the respective causes of action of the other six lien claimants and the further allegation of assignment by each lien claimant of his claim of lien to the plaintiff herein.

Plaintiff alleges that the owners of said mining claim on the 25th day of May, 1912, were Angus McDougall, Michael Hyland, who prior to the filing of the complaint herein sold his interest to Dave Cascaden, Thomas A. McGowan and J. A. Clark, who upon said date leased said claim to Angus McDougall for a period of ten years. That the defendant John A. Healey on the 12th day of May, 1913, caused a writ of attachment to issue against said McDougall and levied the same upon said Pioneer Quartz Mining Claim. That on or about the 3rd day of June, 1913, said McDougall made an assignment of certain property to Geo. M. Smith and Roy Rutherford for the benefit of his creditors assigning among other property his undivided interest in and to said Pioneer claim and leasehold interest therein. Plaintiff's complaint herein was filed in the Court on the 21st day of August, 1913. The defendants Smith, Rutherford and Healey have answered. The defendant McDougall is in default. From the record it appears that defendants McGowan, Clark, Cascaden and Kopits have not been served.

In the first place the Court calls attention to the second paragraph of the note to Title XII, page 276

of the Compiled Laws of Alaska:

“The safe and proper rule of construction of Mechanics’ Lien statutes is that while the remedial portions of these statutes should be liberally construed, with a view to avoid defeating the purpose of the statute, yet those parts upon which the right to the existence of a lien depend, being in derogation of the common law, should be strictly construed:

Morris v. Marsh (3 Alaska Rep. 144.)”

Chapter 28 of the Compiled Laws of Alaska definitely sets forth what the claimant must do in order that he may have a lien. No liberal construction is permitted to be applied to the mandatory requirement of the statute that the claim of lien must be filed within the specified time in order that it may become an actual lien instead of a claim and may charge the property with a special statutory liability.

The evidence shows that on the 20th day of May, 1913, the plaintiff Irvine and five of the other claimants subscribed and swore to their respective Claims for Mechanic’s Liens; ;that the seventh claimant subscribed and swore to his Claim for Mechanic’s Lien on the 28th day of May, 1913, and that it was filed for record in the office of the Recorder for the Faribanks Recording Precinct on the same date. Irvine’s Claim was filed for record on the 7th of June, and the other Claims were filed between the 27th of May and the 7th of June.

No lien exists until the Claim of Lien is filed as prescribed by statute. The provisions of the statute permit of no other construction. The statute plainly says to the claimant that if a special security is de-

sired then the claimant must fully comply with the special provisions of the statute designed to afford such special security.

The evidence shows that all the claimants who assigned to Irvine, with the exception of one King, made such assignments prior to the time of filing their several claims with the recorder. The claimant King on cross-examination testified that he had made his assignment the day prior to May, 1915, the date on which he testified in the trial of this case.

Plaintiff's Exhibit "I," introduced in evidence, reads as follows:

"For value received, I hereby assign and sell to Jack Irvine, my claim against Angus McDougall for work and labor performed upon the Pioneer Quartz Mining Claim at the head of Fairbanks Creek and also any and all rights which I may have by virtue of having filed a mechanic's lien for said amount upon said claim.

"JAMES FOX.

"DONALD HAYES.

"JOHN WENSEL.

"JOHN H. SULLY.

"HENRY BERKS.

"TOM KING."

The evidence shows that at the time this instrument, which is not dated, was signed, the respective claimants, with the exception of King, had not filed their respective claims of lien, and therefore their liens as such were not assigned.

In each cause of action except the first in plaintiff's complaint it is alleged "that subsequent to the filing of said lien said (claimant), for a valuable consideration, assigned said claim against said McDougall and

all rights by virtue of having filed said lien, to the plaintiff, who is now the owner and holder thereof."

In the absence of any statute to the contrary the assignment of the claim before the perfection of lien destroys the right to lien.

56 N. W. 722; 35 N. E. 638; 25 Pac. 1070.

See also *Arndt v. Manger et al.*, No. 1838, records of this Court (unreported).

It is stated in *Boisot on Mechanic's Liens*, Sec. 10, as follows:

"In several of the states the statute expressly declares that mechanics' liens are assignable. Where this is the case, the question is, of course, at rest, so far as that state is concerned. But where the statute says nothing on that subject, the question of assignability depends mainly upon the point whether or not the lien has been perfected by filing the claim before the assignment is made. In nearly all the states the person claiming the lien is obliged, in order to perfect it, to file a claim verified by affidavit, showing, among other things, the amount that is due to him for labor or materials furnished by him. If he has assigned the account before he files his claim, he cannot truthfully swear that there is anything due him, because the debt is then due, not to him, but to his assignee. But his assignee cannot truthfully swear that he has either done work or furnished materials, and it is only to those who furnish either labor or materials, or both, that a lien is given. It follows, logically, from this reasoning, that a mechanic's lien, before being perfected by filing a claim, is not assignable; and a majority of the

decisions so hold."

The mere right to a lien is not assignable:

7 N. W. 401. 32 N. W. 219. 41 Pac. 1103.

4 Oreg. 29. 57 N. E. 715. 90 N. E. 73.

118 Pac. 103-113. 142 Pac. 785.

27 Cyc. 255-256.

Regarding the lien of Irvine, the plaintiff herein, the Court finds from the evidence that he has a valid lien on the property described, as alleged in the first cause of action, and that his lien is superior to the attachment of the defendant Healey.

In accordance with the views herein expressed, findings of fact, conclusions of law, judgment and decree may be prepared and submitted.

Dated this 1st day of June, 1915.

CHARLES E. BUNNELL,

District Judge.

APPENDIX C.

In the District Court for the Territory of Alaska.
Fourth Judicial Division.

Jack Irvine, Plaintiff, vs. Angus McDougall, J. A.
Healey, Geo. M. Smith, and Roy Rutherford,
Defendants.

NO. 1938.—CERTIFICATE.

United States of America, Territory of Alaska,
Fourth Judicial Division,—ss:

I, J. E. Clark, do hereby certify that I am the Clerk of the United States District Court for the Fourth Judicial Division of the Territory of Alaska, and as such am custodian of all the original papers, files, and records in the above entitled cause, and that I have in my possession, as such Clerk, all the exhibits filed in said cause during the trial thereof;

that, at the request of the attorneys for the defendants above named, I have examined the endorsements on the exhibits filed on behalf of plaintiff, and particularly the endorsements on the lien notices filed on behalf of plaintiff in support of his case, said endorsements having been placed thereon by the deputy Recorder for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at the time said liens were filed for record, with the following results:

Exhibit A, lien claim of Jack Irvine, filed for record 7 June 1913, at request of Harry E. Pratt, as instrument No. 38949;

Exhibit C, lien claim of John Wensel, filed for record 27 May 1913, at request of Harry E. Pratt, as instrument No. 38905;

Exhibit D, Lien claim of Donald Hayes, filed for record 2 June 1913, at request of Harry E. Pratt, as instrument No. 38935;

Exhibit E, lien claim of James Fox, filed for record 2 June 1913, at request of Harry E. Pratt, as instrument No. 38934;

Exhibit F, lien claim of Henry Berks, filed for record 7 June 1913, at request of Harry E. Pratt, as instrument No. 38950;

Exhibit G, lien claim of Thomas King, filed for record 28 May 1913, at request of Harry E. Pratt, as instrument No. 38907;

Exhibit H, lien claim of John Sully, filed for record 27 May 1913, at request of Harry E. Pratt, as instrument No. 38904;

That at the time said liens were filed for record, as shown thereon, John F. Dillon was United States Commissioner and ex-officio Recorder in and for

the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and C. E. Wright was deputy Recorder, and all said endorsements on said exhibits have stamped thereon the name of "John F. Dillon, Recorder," and underneath is stamped the word "By" and then the name of "C. E. Wright" is written thereon, with the word "Deputy" underneath said name, and said endorsements of record bear the same dates that are given in the complaint on file in said action as the dates when said instruments were recorded.

(SEAL)

J. E. CLARK,

Clerk of the United States District Court for the
Territory of Alaska, Fourth Judicial Division.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JACK IRVINE,

Appellant.

VS.

ANGUS McDOUGALL, J. A. HEALEY,
GEO. M. SMITH and ROY RUTHER-
FORD,

Appellees.

Appeal from United States District Court, Territory
of Alaska, Fourth Judicial Division.

REPLY BRIEF ON BEHALF OF APPELLANT

HARRY E. PRATT

LOUIS K. PRATT,

Attorneys for Appellant.

Filed

MAR 16 1916

F. D. Monckton,
Clerk.

No.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JACK IRVINE,

Appellant,

VS.

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FORD,

Appellees.

Appeal from United States District Court, Territory
of Alaska, Fourth Judicial Division.

REPLY BRIEF ON BEHALF OF APPELLANT

I

In the first paragraph of that part of the appellees' brief designated "argument," it is stated that there is no assignment of error with reference to the Court's action upon the assigned claim of Tom King. The answer to this statement is merely a reference to the printed record, pps. 91 and 92, and in connection therewith pps. 57, 58, 59 and 60; also pps. 93 and 94. Neither is there any variance between the allegation of the complaint as to King's assign-

ment and the proof for there is no allegation of a written assignment; record page 16.

II.

The spirit of reckless mis-statement was not confined by the appellees to the above mentioned portion of their brief, but was continued to greater length in an attempt to make it appear to this Court, that one of the witnesses on behalf of the appellant, to-wit; Harry E. Pratt, was not sworn, but was allowed to give his testimony upon important matters without an oath. This attempt to thus mislead the Court is indeed bold, for this is a matter in a Court of record where the testimony was taken down by a competent stenographer; where the records of the Clerk of the Court are complete and where the trial was had before the Judge, himself. It is true, that through a stenographical oversight, the words "Harry E. Pratt, duly sworn, testified," were omitted, but the record, page 45, shows the direct testimony of said witness and the questions and answers. The matters testified to are of distinct importance to the plaintiff's case and admissible only as sworn testimony. The certificate to the bill of exceptions (page 67 of record), as well as the preface to said bill (printed record, page 40), conclusively shows that the bill contains only proper testimony and that all of said testimony had a bearing upon those portions of the Court's decision complained of by the plaintiff. Said witness gave said testimony under oath as the record, when fairly viewed, shows.

On the trial of this cause, there was never any dispute about the facts. The uncontradicted evidence showed that the assignments introduced were signed before the filing of the lien claims, given by the lien claimants to their own agent, to-wit; Harry E. Pratt, who was by them, directed to deliver the same to the plaintiff Irvine, after the lien claims had been filed. The evidence further showed that said delivery was made after the lien claims were filed, and before the commencement of this suit. Counsel for appellees and the Court took the view that the mere signing of the assignments, without the assignors parting with control and without any delivery of the assignment or acceptance on the part of the assignee, constituted such a complete parting of title on the part of the assignors that they lost their right to file the lien claims. The Court, on the evidence as above stated, made the erroneous conclusion that the assignment had been completed before the filing of the lien statements and refused to grant plaintiff any relief therefor.

All lien claims were filed for record and the liens perfected by the 7th day of June, 1913. This suit was commenced upon the 23rd day of August, 1913, over two and a half months later. The record shows that upon August 23, 1913, Harry E. Pratt, was one of the attorneys for plaintiff, Jack Irvine. This relationship of attorney and client, however, did not exist, as is shown by the record, until long after the lien claims of the assignors had been filed and deliv-

ery had been made of the assignments to the plaintiff Jack Irvine.

Appellees further claim that the testimony of the witness, Harry E. Pratt, is unsupported. We call attention to the fact that the plaintiff, Jack Irvine, testified on that point as follows:

“Q When was that assignment delivered to you and executed?

“A Shortly after the liens were filed.

“Q With reference to the filing of your suit, when was that delivered to you?

“A It was before the suit was started.” (Pps. 40 and 41 of record.

The assignment itself, by its wording, shows that it was intended to be effective only after the liens had been filed, for it assigns, “all rights which I may have by virtue of **having** filed a mechanic’s lien.” The complaint filed August 23, 1913, in each assigned cause of action, specifically recites that the assignment was made after the lien claims had been filed. (Record, pps. 9, 11, 13, 14, 16 and 18.)

III.

Appellees further state that no personal judgment was asked for against defendant McDougall. Attention is directed to the prayer of the amended complaint (record, p. 19) and to plaintiff’s proposed findings of fact and conclusions of law in the printed record, numbers 27 and 28, page 57; Plaintiff’s proposed conclusion of law number 4, page 59; Assignments of error numbers 4 and 5, page 92; assign-

ments of error numbers 7, 8, 9, 10, 11, 12, and 13, pages 93 and 94, of printed record.

IV.

The opinion of the trial court dated June 1, 1915, was not such an opinion that it should have been included in the record as it has no lawful existence and is of no legal import.

After hearing an equity case the only thing the Judge has authority to do is to make findings of fact and conclusions of law. Section 1204, Compiled Laws of Alaska, 1913. Any opinion filed by him after the conclusion of the trial, and before the findings of fact, is merely a guide or memorandum for the direction of those preparing the findings of fact and said opinion becomes merged in and supplanted by such findings of fact.

Juneau Water Co. vs. Jualpa Co. 3 Als. Rep. 387.

The endorsements of the recorder upon the lien claims of the plaintiff and his six assignors, show that the liens were filed at the request of Harry E. Pratt. This does not constitute any evidence of anything material to this case. The fact that a designated person has handed a paper to a recorder raises no presumption of agency of any sort other than agency to hand said paper to a recorder. Still further, the certificate of the Judge to the bill of exceptions shows that the bill contains all of the evidence and exhibits upon which the Court's decision

was based. (Page 67 of record).

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.

17

2733

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

VS.

WILLIAM A. MAHAFFEY,

Defendant.

NELSON COOPER, Intervenor,

Appellee.

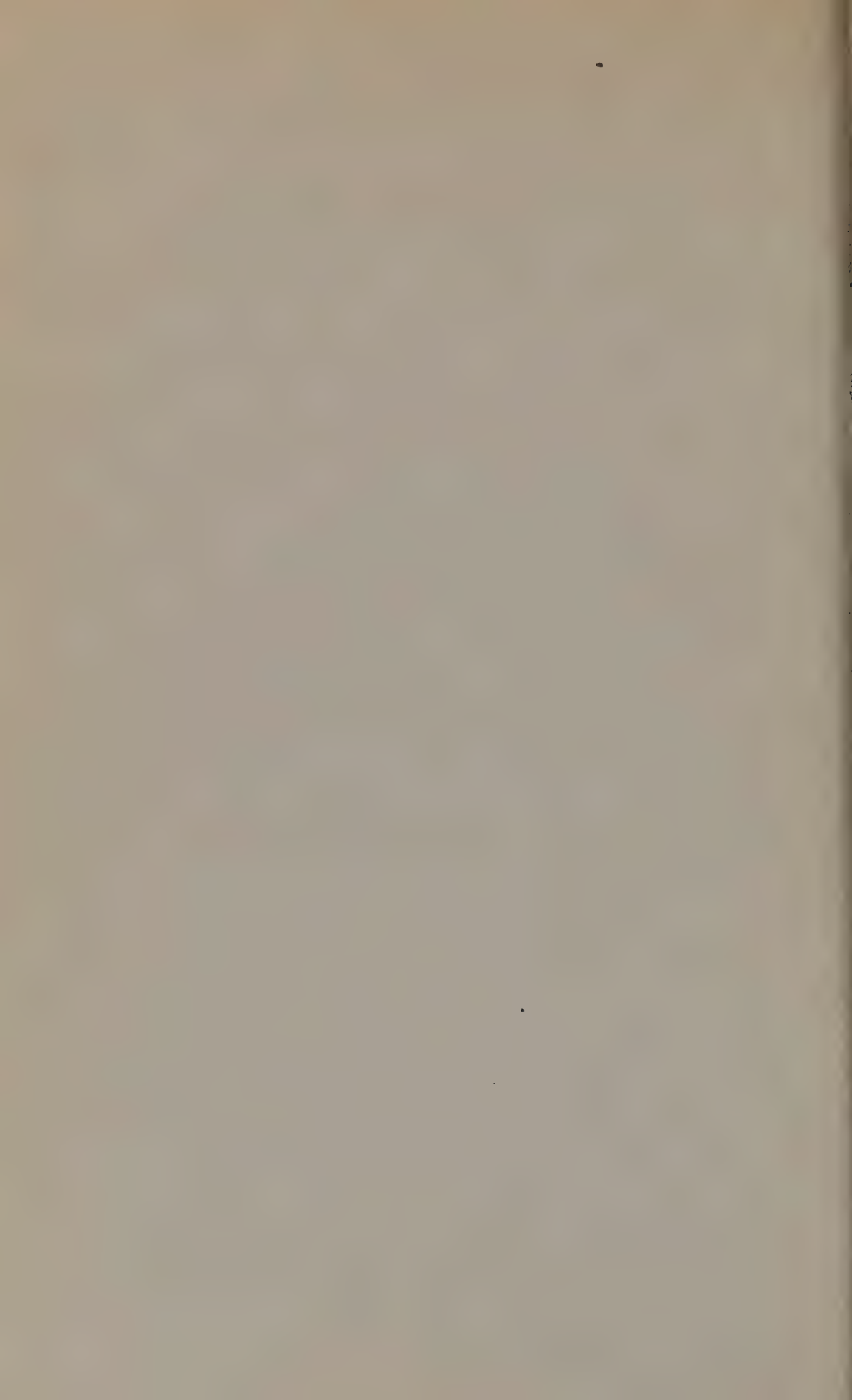
Transcript of Record.

Upon Appeal from the United States District Court
for the District of Montana.

Filed

JAN 21 1915

F. D. Monckton,
Clerk



No.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

VS.

WILLIAM A. MAHAFFEY,

Defendant.

NELSON COOPER, Intervenor,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
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Names and Addresses of the Solicitors of Record.

Hon. T. W. GREGORY, Attorney General of the
United States, of Washinton, D. C.

Hon. BURTON K. WHEELER, United States
Attorney for the District of Montana, of Butte,
Montana.

Solicitors for Plaintiff and Appellant.

Hon. JAMES A. WALSH, of Helena, Montana,
Solicitor for Intervenor and Appellee.

*In the District Court of the United States in and
for the District of Montana.*

IN EQUITY—No. 949.

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

NELSON COOPER,

Intervenor.

BE IT REMEMBERED, that on December 7th,
1909, the complainant filed its Bill of Complaint
herein in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth
Circuit, District of Montana.*

UNITED STATES OF AMERICA,
Complainant.

vs.

WILLIAM A. MAHAFFEY,
Defendant in Equity.
In Equity.

BILL OF COMPLAINT.

To the Honorable, the Circuit Court of the United
States, Ninth Circuit, in and for the District
of Montana:

The United States of America, by George W. Wickersham, Attorney General of the United States, and James W. Freeman, United States Attorney for the district of Montana, brings this bill of Complaint against William A. Mahaffey, a resident of the state of Montana, the defendant herein, and thereupon your orator complains and says:

FIRST.

That on and prior to the 27th day of April, A. D. 1899, your orator was the owner in fee simple of those certain lands situated in the state and district of Montana, and within the Helena Land District, and now within the land district of which the land office is at Great Falls, Montana, and particularly described as follows: The south half of the northwest quarter of section eleven; the south-

east quarter of the northeast quarter and the northeast quarter of the southeast quarter of section ten in township nineteen north range three west of the principal Montana Meridian, containing one hundred and sixty acres of land, situated, lying and being in the county of Cascade, state of Montana, and that on said 27th day of April, A. D. 1899, the said defendant, William A. Mahaffey, under and by virtue of the provisions of Section 2289 of the Revised Statutes of the United States, made and filed in the local land office of the United States, at Helena, in the state and district of Montana, his application No. 10048, to enter as a homestead the lands hereinabove described.

SECOND.

That at the time of the filing by the said defendant, William A. Mahaffey, of his said homestead application No. 10048, to enter the above described land and premises and contemporaneously therewith, said defendant likewise filed in the said local land office of the United States, as required by law, his affidavit and statement in writing under oath, in which, among other matters and things, he stated and deposed that his said application to enter said land as a homestead was honestly and in good faith made for the purpose of actual settlement and cultivation, and that the said defendant would faithfully and honestly endeavor to comply with all the requirements of law as to said land and the residence and cultivation necessary to acquire the title to said land so ap-

plied for, and had not applied and did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for himself. That thereupon said defendant then and there paid to the Receiver of the said local land office of the United States, at Helena, Montana, the sum of sixteen dollars, the same being the proper and legal fee then and there due and payable to the said Receiver upon the filing of said application aforesaid. That thereafter, on the 27th day of April, A. D. 1899, and upon such payment having been made as aforesaid, a receipt was then and there issued and delivered by the said Receiver of the said Helena Land Office to the said defendant for said amount of money so paid by him as aforesaid, and attached to and connected with said receipt was and is a notation setting forth in detail the requirements of the law to be observed and complied with by the said defendant in order to obtain title to said lands so applied for by him as aforesaid, and to be entered by him, as follows, to-wit: "Note—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years of the expiration of the said five years, he must offer proof of his actual settlement and cultivation, failing to do which, his entry will be cancelled. If the settler does

not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from the date of filing affidavit to the time of payment."

THIRD.

That thereupon, in order to entitle the said defendant to obtain and procure from the said United States a patent for said tract of land, under the homestead laws of the United States, it was incumbent upon the said defendant, and he was required to make, actual settlement upon the said lands and reside thereon and cultivate the same for a period of five years from and after the time of the filing in said local land office at Helena, Montana of his said application and affidavit hereinbefore set forth, or in case said defendant did not desire to remain upon said land the full period of five years, to make payment for said land at the expiration of fourteen months from and after the filing of said application and affidavit, upon making proof before the Register and Receiver at the said local land office of the United States, at Helena, Montana, of settlement upon and cultivation of said lands by said defendant from the date of the filing of said application and affidavit down to the time of making such payment. That thereafter, on the 15th day of June, 1904, the said defendant appeared before C. H. Benton, then and there the Receiver of the United States Land Office at Great Falls, Montana, which said

land office was then and there the proper local land office for making of final proof upon said homestead entry hereinbefore mentioned, with his witnesses, Charles Wise and Charles Gilbert, and offered proof before the said Register and Receiver that he had settled upon said lands and premises and actually resided thereon and cultivated the same as required and within the meaning and intent of the said homestead laws of the said United States, and then and there gave, made out and signed his deposition and swore to the same before the said C. H. Benton, Receiver of the United States Land Office, as aforesaid, and at the same time filed and caused to be filed said affidavit and deposition and sworn statement, in the United States Land Office at Great Falls, Montana, said land office then and there being the proper United States Land Office of the land district wherein the said lands are situated, and then and there offered, presented and delivered and filed said affidavit, deposition and sworn statement so made, signed and sworn to by the said defendant, to and with the Register and Receiver of the said United States Land Office, as proof of the settlement and residence upon and the cultivation of the said lands and premises by the said defendant as required by law and the statute in such case made and provided, and the same were accepted by the said Register and Receiver of the said land office.

FOURTH.

And your orator sheweth unto your honors that the said defendant in the said affidavit, deposition and sworn statement, made, signed and sworn to by him as aforesaid, and offered, presented, delivered to, and filed with, the said Register and Receiver, and accepted by them as proof of the settlement and residence of said defendant upon said lands and of the cultivation of the same by the said defendant, among other matters and things, testified and deposed that he had actually resided upon said lands since June, 1898, and had resided on said lands continuously since June, 1898; that he had placed improvements upon said land of the value of three hundred dollars and that he had constructed a house upon said land, sixteen feet by eighteen feet, and had constructed a wire fence around said property, and had constructed corrals, and the said defendant procured from each of said witnesses, Charles Wise and Charles Gilbert, affidavits, depositions and sworn statements taken before the said C. H. Benton, as aforesaid, made, signed and sworn to by the said witnesses before the said Receiver as aforesaid, to the same effect and corroborative and in aid of the said affidavit, deposition and sworn statement, made, signed and sworn to by the said William A. Mahaffey, and filed the same, together with said defendant's own affidavit, deposition and sworn statement, in the local land office of the United States, at Great Falls, and offered, presented and delivered the

same to the said Register and Receiver of the said land office, together with his own affidavit, deposition and sworn statement, as proof of the settlement and residence upon and cultivation of, the said lands by the said defendant, as required by law, and all of the said affidavits, depositions, testimony, and sworn statements of the said defendant and his said witnesses, so made, signed and sworn to, as aforesaid, and offered, presented and delivered to the said Register and Receiver of the said land office, as aforesaid, were, and each of them was, then and there taken and accepted by the said Register and Receiver of the said land office as proof of the settlement and residence of the said William A. Mahaffey upon the said premises. That on the said 23rd day of June, 1904, the said defendant paid to the Receiver of the said United States Land Office, at Great Falls, Montana, the sum of \$6.00, being the balance of payment for said land, as required by law, and thereupon the said Receiver then and there issued to the said defendant his final receipt No. 691 for the said moneys so paid ^{to} him by the said defendant in payment of said lands as aforesaid, and the Register of the said land office likewise then and there issued said defendant his certificate No. 691 for said lands, certifying that in pursuance of law, the said defendant had purchased said lands, and upon presentation of said certificate to the Commissioner of the General Land Office, said defendant should be entitled to receive a patent for said lands here-

inbefore more particularly mentioned and described; that thereafter such proceedings were had that on the 31st day of December, A. D. 1904, a patent was issued by the said United States to the said defendant for the said lands, which patent was duly delivered to the said defendant, William A. Mahaffey, and received by him.

FIFTH.

And your orator further showeth unto your honors that the said acceptance of the said affidavits, depositions and testimony of the said defendant and of his said witnesses, Charles Wise and Charles Gilbert, as proof of the settlement and residence of the said defendant upon said lands, and the cultivation of the same by him, as required by law, by the said Register and Receiver, and the issuance by the said Receiver of the ^{said} final receipt and the issuance of the said certificate of purchase by the said Register, as hereinabove mentioned and set forth, and the issuance of the said patent for the said tract of land by the United States, were had and done by the said officers of the said land office and the officers of your orator, the United States, in reliance by them, and each of them, upon the truth of the testimony and statements contained in the affidavits and depositions of said witnesses, Charles Wise and Charles Gilbert, and in reliance upon the good faith of the said defendant and his said witnesses in the premises, and not otherwise.

SIXTH.

That the said affidavit and deposition of the said defendant, and the affidavits and depositions of the said witnesses, Charles Wise and Charles Gilbert, were, and each of them was, then and there false, fraudulent and untrue, as was then and there well known to the said defendant and to each of his said witnesses, and made with intent to deceive the officers of the United States and with intent to fraudulently obtain patent to the said land hereinabove described and by fraud and deceit to procure a patent for the said lands, by means of false and fraudulent testimony and statements made and contained in the said affidavits, depositions and testimony, in this, to-wit: That the said defendant had not established and did not establish residence upon said lands or any portion thereof during the month of June, 1899, or at any other time, or at all; that the said defendant had not, at the time of making his said proof and the filing of the same in the said land office, resided on said land or any part or portion thereof, continuously, or in any other manner, or at all, since the month of June, 1899, or at any other time, or at all, and had not then, or at any other time, built a frame house, sixteen by eighteen feet, and that the said defendant had not enclosed said lands with a fence, and that the said defendant, at the time of the filing of said depositions had not built any corral or fence whatever, and that the said defendant did not then and there, or

at any other time, have improvements upon the said land of the value of three hundred dollars, or any other value or amount whatsoever. That your orator alleges the fact to be that the said defendant never did make a settlement upon said lands, or any part thereof, and did not establish his residence upon said lands or any part thereof, and never did cultivate any part or portion thereof, and had no improvements thereon, and that each and every of the said statements so made by the said defendant and his said witnesses, as hereinbefore specifically mentioned and set forth, and which are contained in the said affidavits, depositions and testimony to prove settlement and residence by the said defendant upon said land, and the cultivation by said defendant of the same, as required by the homestead laws of the United States, are utterly false and fraudulent and untrue, in every particular, as he, the said defendant, then and there well knew.

SEVENTH.

And your orator further charges and alleges that the said testimony of the said defendant, William A. Mahaffey, as contained in said affidavit and deposition of said defendant, and the testimony of his said witnesses, Charles Wise and Charles Gilbert, as contained in said affidavits and depositions, made by them, as aforesaid, was false, fraudulent and untrue in the respects and in the several particulars as hereinbefore set forth, and the same were made, offered, presented and filed

as proof of the settlement and residence of the said defendant upon said lands and the cultivation of the same, as aforesaid, for the false and fraudulent purpose of imposing upon and deceiving the Register and Receiver of the said United States Land Office at Great Falls, Montana, and to cause and induce the said officers and agents of your orator to believe that the said testimony contained in said affidavits and depositions were true, and that the said defendant had, in fact, made and established a settlement and resided upon said tract of land, and had cultivated the same as by law required, for the purpose of obtaining and procuring, by means of fraud and deceit the issuance to said defendant of a patent of the United States for the said lands hereinbefore described.

EIGHTH.

And your orator further sheweth unto your honors that the said defendant, William A. Mahaffay, by means of the said false and fraudulent depositions and the false and fraudulent statement therein contained, given under the sanction and oath of the said defendant and his said witnesses, imposed upon and deceived the said officers and agents of the United States, and caused and induced the said officers and agents of the said United States to believe that the testimony and statements contained in said depositions were true, and that the said defendant had actually settled and resided upon said lands and cultivated the same in the manner and to the extent as stated in

said depositions, and that the said officers of your orator, the United States, supposing and believing the said testimony and statements contained in said depositions of said defendant and his said witnesses to be true, and relying upon the truth of the said testimony and statements, so falsely and fraudulently given and made by said defendant and his said witnesses, as aforesaid, and believing and supposing on the strength of said depositions and testimony that the said defendant had actually made settlement and established his residence upon said land and cultivated the same, in the manner and to the extent, and for and during the period of time as therein stated by him, the said defendant and his said witnesses, Charles Wise and Charles Gilbert, were wholly deceived and misled into allowing said proof to be filed and accepted and in permitting the issuance of said final receipt and the issuance of said certificate of purchase of said land, and of the United States patent therefor, by the said officers of the United States, as hereinbefore set forth, and delivering said patent to the said defendant, William A. Mahaffey.

NINTH.

And your orator further sheweth unto your honors, that the existence of the said patent, so fraudulently obtained and procured by the said defendant, as aforesaid, on its face entitles the said defendant to exercise the right of absolute ownership of and over the said lands hereinbefore mentioned and described, and assert a legal title to the

same, to which the said defendant is not entitled. That if the said patent remains uncanceled and in force, it can be used in fraud of your orator and all persons relying thereon, as a valid and subsisting conveyance of the legal title to said lands and premises above described.

All of which actions, doings, and pretences of the defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of the complainant in the premises.

IN CONSIDERATION WHEREOF, and forasmuch as the complainant is renidiless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where matters of this nature are properly cognizable and relievable, and, TO THE END, THEREFORE, that the said defendant, William A. Mahaffey, may full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged but not under oath (an answer under oath being hereby expressly waived) as fully and particularly as if the same were hereinafter repeated and he thereunto distinctly interrogated; and to the end that the said defendant and all and singular his agents, employes, and servants may be forthwith and forever restrained and enjoined from setting up and asserting or claiming any rights, privileges, benefits, or advantages under and by reason of said patent; and to the end that said patent so issued by the

complainant to the said William A. Mahaffey may be declared void and cancelled; and that the legal and equitable title to and right of possession of all and singular the lands at Paragraph I. herein described be restored and given to complainant; and that the complainant have such other and further relief in the premises as the circumstances of this cause may require and as to this honorable court may seem meet and proper, and as shall be agreeable to equity and good conscience.

May it please your honors to grant unto the complainant the Writ of Subpoena to be directed to the said William A. Mahaffey thereby commanding him at a certain time and under a certain penalty therein to be specified, personally to be and appear before this honorable court, and then and there to answer all and singular the premises and to stand to and abide such further order, direction, or decree therein as to this honorable court shall seem meet.

GEO. W. WICKERSHAM,

Attorney General of the United States.

JAS. W. FREEMAN,

United States Attorney, District of Montana.
United States of America,
District of Montana,—ss.

JAMES W. FREEMAN, being first duly sworn, deposes and says: That he is the regularly appointed, qualified and acting United States Attorney for the district of Montana, that he has read the foregoing bill of complaint and knows the con-

tents thereof, and that the matters and facts therein stated and alleged are true to the best of his knowledge, information and belief.

JAS. W. FREEMAN.

Subscribed and sworn to before me this 7th day of December, 1909.

GEO. W. SPROULE,

Clerk U. S. Circuit Court, District of Montana.

(Indorsed): Title of Court and Cause. Bill of Complaint. Filed and entered Dec. 7, 1909. Geo. W. Sproule, Clerk.

Thereafter, on December 7, 1909, a subpoena in equity was duly issued herein in the words and figures following, to-wit:

(Subpoena.)

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Judicial
Circuit, District of Montana.*

IN EQUITY.

The President of the United States of America,
Greeting: To William A. Mahaffey, Defendant.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the court room in Federal Building, Helena, Montana, on the 3rd day of January, A. D. 1910, to answer a Bill of Complaint exhibited against you in said court by the United States of America, complainant and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under

the penalty of Five Thousand Dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of December, in the year of our Lord one thousand nine hundred and nine and of our Independence the 134th.

GEO. W. SPROULE,
Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of January next, at the Clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

GEO. W. SPROULE,
Clerk.

GEO. W. WICKERSHAM,
U. S. Attorney Genl.,
J. W. FREEMAN,
U. S. Attorney, Helena, Montana.
Solicitors for Complainant.

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the 7th day of December, 1909; was unable to find within named defendant in the district of Montana.

ARTHUR W. MERRIFIELD,
U. S. Marshal.
By Scott N. Sanford,

Deputy.

(Indorsed): Title of Court and Cause. Subpoena in Equity. Filed Jan. 24th, 1910. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Thereafter, on April 5th, 1910, a petition for an order directing service of subpoena in equity to be made by publication was duly filed herein in the words and figures following, to-wit:

IN EQUITY—No. 949.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

PETITION.

Comes now the complainant, the United States of America, by S. C. Ford, Assistant United States Attorney for the District of Montana, and shows unto this Honorable Court that heretofore, to-wit, on the 7th day of December, A. D. 1909, complainant filed its bill of complaint against the above named defendants for the purpose of obtaining a decree from the court decreeing and adjudging null and void a certain United States patent fraudulently obtained from said complainant for the south half of the northwest quarter of section eleven; the southeast quarter of the northeast quarter and the northeast quarter of the south-

east quarter of section ten in township nineteen north, range three west of the principal Montana meridian, containing an area of one hundred and sixty acres, more or less, which said land is fully mentioned, set forth and described in said complainant's bill of complaint on file herein, and to which reference is hereby made.

That thereafter, on the 7th day of December, A. D. 1909, a subpoena was duly issued, addressed and directed to said defendant and placed in the hands of the United States Marshal for the District of Montana for service upon said defendant, and whose return upon said subpoena shows that after diligent search and inquiry the said defendant could not be found in the District of Montana; that he has ^{made} inquiries and has been unable to learn his address; that the said defendant is not an inhabitant of nor could be found within the State and District of Montana, and that the said defendant has not voluntarily appeared in this action and that his residence is unknown to complainant, and that said service of subpoena cannot be had or obtained upon said defendant within the State and District of Montana, and that personal service cannot be had upon said defendant for the reason that his whereabouts are unknown.

WHEREFORE your petitioner prays that an order be made and granted by this Honorable Court, requiring and directing said defendant, William A. Mahaffay, to appear and plead, answer or demur to said bill of complaint by a day certain

to be fixed and designated by the court, and that said order be published in the Montana Daily Record as required by law.

S. C. FORD,

Assistant U. S. Attorney.

United States of America,

District of Montana,—ss.

S. C. FORD, Being first duly sworn, deposes and says that he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

S. C. FORD.

Subscribed and sworn to before me this 5th day of April, A. D. 1912.

GEO. W. SPROULE,

Clerk.

(Indorsed): Title of Court and Cause. Petition filed April 5, 1912. Geo. W. Sproule, Clerk.

Thereafter, on July 6th, 1912, an affidavit of publication of subpoena was duly filed herein in the words and figures following, to-wit:

AFFIDAVIT OF PUBLICATION.

State of Monana,

County of Lewis and Clark,—ss.

R. L. FISK, being duly sworn, says he is foreman of The Montana Daily Record, a daily newspaper printed and published at Helena, Lewis and Clark County, Montana; that it is a newspaper of

general circulation in said county and state, and that the annexed, being U. S. of America vs. Wm. A. Mahaffey, Equity Order No. 949, was published in said newspaper, and not in a supplement thereof, and is a true copy of the notice as it was published in the regular and entire issue of said paper for a period of 6 consecutive weeks (one time a week), commencing on the 10th day of April, 1912, and ending on the 15th day of May, 1912, and that said newspaper was regularly distributed to its subscribers during all of said period.

R. L. FISK, Foreman.

Subscribed and sworn to before me this May 16, 1912.

(Notarial Seal)

J. D. CONRAD,

Notary Public for the State of Montana, residing at Helena, Montana. My commission expires December 12, 1914.

No. 949. IN EQUITY. ORDER.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

It having been made to appear in the above cause that the defendant William A. Mahaffey is not a resident of or within the state and district of Montana and cannot be found after due and diligent

search and inquiry within the said state and district, and that the whereabouts of said defendant are unknown, and that personal service of process in this court cannot be had or obtained upon the aforesaid defendant within the said state and district of Montana, and that personal service upon said defendant is not practicable for the reason that his whereabouts are unknown; and application having been made to this court pursuant to section 8 of the act of March 3, 1875, for an order of this court, requiring and directing said defendant to appear and plead, answer or demur to said complainant's bill of complaint on file herein by a day certain to be fixed and designated by this court; and it appearing to the court that said suit was commenced by complainant to enforce an equitable claim to land situated in the state and district of Montana and more particularly described in complainant's bill of complaint on file herein, to which reference is hereby made, said suit being brought for the purpose of cancelling and annulling a certain United States patent fraudulently obtained from said complainant by William A. Mahaffey, for the south half of the northwest quarter of Sec. 11; southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter, Sec. 10, Twp. 19, N. R. 3 West, M. P. M.

Now, therefore, it is ordered that the said application be, and the same is, hereby granted, and you, the said William A. Mahaffey, are hereby ordered, required and directed to be and appear in the said

district court, in said district, on the 3rd day of June, A. D. 1912, then and there to plead, answer or demur to said complainant's bill of complaint exhibited against you in said court by said complainant, the United States of America, to which said bill of complaint you are hereby referred, and to do and receive what the said court shall have considered in that behalf; and

It is further ordered that this order be published in the Montana Daily Record, a newspaper published at Helena, in the county of Lewis and Clark, state and district of Montana, being a newspaper of general circulation and the most likely to give notice to said defendant, once a week for six consecutive weeks.

Dated this 5th day of April, A. D. 1912.

GEO. M. BOURQUIN,

District Judge.

J. W. FREEMAN,

U. S. Attorney, District of Montana.

S. C. FORD,

Asst. U. S. Attorney, District of Montana.

Helena, Montana. First publication April 10, 1912.

(Indorsed): Title of Court and Cause. Affidavit of Publication. Filed and entered July 6, 1912. Geo. W. Sproule, Clerk.

Thereafter, on March 26th, 1915, an order *pro confesso* as to defendant William A. Mahaffey was duly filed and entered herein in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant.

VS.

WILLIAM A. MAHAFFEY,

Defendant.

ORDER PRO CONFESSO.

It appearing that an order was duly made in the above entitled cause on the 9th day of December, 1909, requiring and directing the said defendant to appear in said district court of the United States, in the city of Helena, state and district of Montana, therein to plead or answer to plaintiff's bill of complaint exhibited against said defendant in said court by the plaintiff, and to do and receive what the court should consider in said behalf; and

It further appearing that said order could not be served upon said defendant, and that an order directing the publication of process be had upon said defendant was duly made and entered on the 5th day of May, 1912, and

It further appearing that said order so made as therein required and directed was served upon said defendant by publication, pursuant to said order so made on said 5th day of May, 1912; and

It further appearing that said defendant has not appeared either in person or by counsel, and that the said defendant has failed to plead or answer said bill of complaint, and the time for so doing

having expired;

NOW, THEREFORE, upon motion of Burton K. Wheeler, United States Attorney for the district of Montana, and solicitor for the plaintiff;

IT IS ORDERED that the bill of complaint in said cause be taken *pro confesso* as against the defendant, William A. Mahaffey, in accordance with the rules in such case made and provided.

B. K. WHEELER,

United States Attorney.

(Indorsed): Title of Court and Cause. Order *Pro Confesso*. Filed March 26th, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Clerk.

Thereafter, on Sept. 4th, 1912, a petition in intervention was duly filed herein in the words and figures following, to-wit:

*In the District Court of the United States, for the
District of Montana.*

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

PETITION IN INTERVENTION.

To the Honorable, the Judges of the above named court:

The petition of Nelson Cooper, a citizen and resident of Montana, humbly complaining of the

United States of America, plaintiff in the above entitled cause, would show unto your honors:

That the plaintiff in the above entitled cause did, on the 7th day of December, 1909, file its bill in this cause, wherein it set forth that prior to the 27th day of April, 1899, it was the owner of the south half of the northwest quarter of section eleven, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section ten, in township nineteen, north of range three west, principal meridian of Montana, in Cascade County, Montana, containing one hundred and sixty acres;

That on said date William A. Mahaffey made application to enter said lands under the homestead laws of the United States; that the said Mahaffey presented an application and affidavit, setting forth under oath that the said entry was made in good faith for the purpose of settlement and cultivation.

That it was incumbent upon the said Mahaffey to reside upon and cultivate said land for a period of five years; that on the 15th day of June, 1904, the said Mahaffey appeared before the United States Land Office at Great Falls, Montana, for the purpose of making final proof, and with the witnesses, Charles Wise and Charles Gilbert, offered proof, setting forth among other things that he had resided upon said land since June, 1898, and placed improvements thereon of the value of three hundred dollars, constructed a house 16x18 feet, and constructed a wire fence around said property and

had constructed corrals, and which affidavit was corroborated by the affidavits of said Charles Wise and Charles Gilbert;

That the said officers of the said land office, relying upon the said affidavits, issued a certificate to said Mahaffey, setting forth that he would be entitled to a patent for said land.

And it is further set forth in said bill of complaint that the said affidavits were false, fraudulent and untrue, which was then and there well known to the said Mahaffey and each of said witnesses, and the same were made for the purpose of deceiving the officers of the United States, and fraudulently obtaining patent for said lands, and that the said Mahaffey had not settled upon said lands; had not resided thereon, and had not built a house or placed improvements upon said lands, as set forth in said affidavits;

That by means of said affidavits, the officers of the land office were deceived and misled into allowing and accepting final proof and permitting issuance of final receipt, and that thereafter a patent was issued for said lands to the said Mahaffey, and the said complainant prays that patent issued for said lands be declared void and cancelled, and for other and further relief; all of which fully appears in the bill of complaint herein, and to which reference is hereby made as though the same had been set forth herein in full;

That service of subpoena in said cause was made upon William A. Mahaffey by publication, and the

said Mahaffey has not made any appearance therein;

That your petitioner claims an interest in said lands and premises, as follows, to-wit;

That after the making of the final proof, as aforesaid, your petitioner, in good faith and for a valuable consideration, paid by him to William A. Mahaffey and without any notice or information that the said William A. Mahaffey had not in all things complied with the laws of the United States in procuring title to said lands and without notice or information that the complainant herein claimed that the said Mahaffey had not, in all things, complied with the law, in relation to residing upon, improving and procuring title to said land, purchased the said land from the said William A. Mahaffey, and the said William A. Mahaffey executed and delivered to your petitioner a deed, wherein and whereby he conveyed to him all and singular the lands and premises mentioned and described in the complaint and hereinbefore set forth.

And your petitioner further shows that at the time he so purchased said land he did not have any notice or information that the said Mahaffey had not in all things complied with the laws of the United States, with reference to procuring title to Government land, or that the Government or its officers claimed that the said Mahaffey had not in all things complied with the law, and your said petitioner thereupon purchased the said lands from the said Mahaffey and paid him a valuable

consideration therefor, and received and accepted a deed conveying said land to him, and he ever since has been, and now is, the owner thereof;

That thereafter he caused a contract to be made and entered into to sell and convey the said lands to George Heaton, and the said George Heaton, in good faith and without notice or information that the said Mahaffey had not, in all things, complied with the law, purchased and agreed to purchase said lands for a valuable consideration paid to this petitioner.

And your petitioner further shows he is under the age of twenty-one years, and has no general guardian.

WHEREFORE, Your petitioner prays that he may be allowed to intervene in this suit and file his answer to the bill of complaint herein and such other pleadings as may be advisable, which answer is herewith submitted, and that a guardian ad litem be appointed, and for such other and further order as to the court shall seem just.

NELSON COOPER,

Petitioner.

JAMES A. WALSH,

Solicitor for Petitioner.

State of California,

County of San Diego,—ss.

NELSON COOPER, being duly sworn, says: That he is the foregoing named petitioner; that he has read the foregoing petition, and the same is true of his own knowledge, except as to those

matters stated on information and belief, and as to those matters he believes it to be true.

NELSON COOPER.

Subscribed and sworn to before me this 30th day of July, 1912.

(Seal)

MARY R. SCHUPP.

Notary Public in and for the State of California, residing at San Diego, California. My Commission expires January 14, 1913.

Service admitted and copy received Aug. 31, 1912.

J. W. FREEMAN,

U. S. Attorney.

(Indorsed): Title of Court and Cause. Petition in Intervention Nelson Cooper. Filed Sept. 4th 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on December 20th, 1912, an amended answer of Intervenor was filed herein in the words and figures following, to-wit:

In the District Court of the United States in and for the District of Montana.

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

and

NELSON COOPER,

Intervenor.

AMENDED ANSWER OF INTERVENOR.

Now comes the Intervenor, Nelson Cooper, leave of the court being first had and obtained, and as an amended answer to the Bill of Complaint herein:

I.

Admits the allegations contained in paragraphs one and two.

II.

Admits the allegations contained in paragraph three, except as to residence, and alleges the same was as stated in the affidavit referred to.

III.

Answering paragraph four, Intervenor says he has not any knowledge or information, as to the particular matters and things set forth and described in said paragraph, but admits that certain testimony and affidavits were subscribed to and delivered to the Register and Receiver of the United States Land Office at Great Falls, Montana, and there was issued to said Mahaffey a final certificate, and thereafter such proceedings were had that, on the 31st day of December, 1904, a patent was issued by the United States of America to the said William A. Mahaffey for the said lands, which patent was duly delivered to the defendant, William A. Mahaffey and received by him.

IV.

Answering paragraph five, intervenor admits that final certificate and patent were issued to said William A. Mahaffey for said lands.

V.

Answering paragraph six, intervenor denies that he has any knowledge or information as to the charges that the said affidavits and testimony were false, fraudulent or untrue, or used with intent to fraudulently obtain patent from the Government of the United States, or of any other matters and things set forth in said paragraph, and therefore denies the same and each thereof, and demands proof of the same.

VI.

That as to the allegations contained in paragraph seven, intervenor denies that he has any knowledge or information thereof sufficient to form a belief, and therefore denies the same, and each thereof, and demands proof of the same.

VII.

And answering paragraph eight, intervenor admits that the officers of the United States Land Office relied upon and believed the testimony contained in said affidavits, but as to the charges that the statements contained in said affidavits were false or fraudulent, intervenor denies that he has any knowledge or information thereof sufficient to form a belief, and therefore denies the same, and demands proof thereof.

VIII.

Admits that the patent aforesaid entitles the defendant and his grantees to the right of absolute ownership of said lands and to assert legal title thereto.

Denies that the same will be used to the damage or detriment of the plaintiff herein.

IX.

And further answering said Bill of Complaint, intervenor avers:

That after making final proof on said lands by the said William A. Mahaffey, and while he was in possession thereof, this intervenor, in good faith and for a valuable consideration, to-wit: More than two hundred dollars, paid by him to said William A. Mahaffey and without any notice or information that the said William A. Mahaffey had not, in all things, complied with the law of the United States in procuring title to said lands, and without notice or information that the complainant herein claimed that the said Mahaffey had not, in all things, complied with the laws of the United States, in relation to residing upon, cultivating and procuring title to said lands, purchased the said lands from the said William A. Mahaffey, and the said William A. Mahaffey executed and delivered to this intervenor a deed, wherein and whereby he conveyed to him all and singular the lands and premises mentioned and described in the Bill of Complaint herein, and the said deed was so delivered and the said money so paid.

And this intervenor, further answering, says that at the time he so purchased said lands, received said deed and paid such money, he did not have any notice or information that the said William A. Mahaffey had not, in all things, complied

with the laws of the United States, with reference to procuring title to Government land, or that the government, or its officers, claimed that the said Mahaffey had not, in all things, complied with the law, and this intervenor thereupon, in good faith, purchased the said lands from the said Mahaffey and paid him a valuable consideration therefor, as aforesaid, and received and accepted a deed, conveying said lands to him; all without the notice or information that the said Mahaffey had not in all things, complied with law, in procuring title to said lands, or that the complainant herein claimed that there was any fraud committed by the said Mahaffey in procuring title to said lands;

That thereafter he caused a contract to be made and entered into to sell and convey said lands to George Heaton, and the said George Heaton, in good faith and without notice that the said Mahaffey had not, in all things, complied with law, in obtaining title to said lands, and without notice that the complainant herein claimed that there was any fraud committed by the said Mahaffey in obtaining title to said lands, entered into a valid and binding contract on his part, and agreed to purchase said lands for a valuable consideration, which was paid to this intervenor by the said Heaton before receiving any notice that the complainant herein claimed there was any fraud committed by the said Mahaffey in obtaining title to said lands;

That said George Heaton is in possession of and owns said lands under said contract, and is a neces-

sary party-defendant herein.

WHEREFORE, Intervenor demands judgment that the suit be dismissed, and for his costs and disbursements herein.

JAMES A. WALSH,
Solicitor for Intervenor.

Service of the foregoing admitted and copy received Dec. 18, 1912.

J. W. FREEMAN,
Solicitor for Plaintiff.

(Indorsed): Title of Court and Cause. Filed and entered Dec. 20, 1912. Geo. W. Sproule, Clerk.

And thereafter, on December 23rd, 1912, replication was duly filed herein in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant.

vs.

WILLIAM A. MAHAFFEY,
Defendant.

and

NELSON COOPER,
Intervenor.

REPLICATION TO THE SEPARATE AND AMENDED
ANSWER OF THE INTERVENOR.

This replicant, saving and reserving to itself all

and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said said intervenor, and for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said intervenor, and that the answer of said intervenor is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill has already prayed.

J. W. FREEMAN,

United States Attorney, District of Montana.

Due service of the within replication acknowledged and true copy thereof received this 20th day of December, 1912.

JAMES A. WALSH,

Attorney for Intervenor.

(Indorsed): Title of Court and Cause. Replication. Filed Dec. 23, 1912. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on July 31, 1915, decree was filed and entered herein in the words and figures following, to-wit:

(DEGREE.)

*In the District Court of the United States in and
for the District of Montana.*

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

and

NELSON COOPER,

Intervenor.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the complainant take nothing herein, and that said suit be, and the same is, hereby dismissed, upon the merits.

Dated this thirty-first day of July, A. D. 1915.

GEO. M. BOURQUIN,

Judge.

(Indorsed): Title of Court and Cause. Decree. Filed and entered July 31, 1915. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on July 30th, 1915, the Court's decision was duly rendered and filed herein in the words and figures following, to-wit:

(OPINION.)

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Plaintiff.

vs.

WILLIAM MAHAFFEY, et al.,

Defendants.

Herein, the court finds that the allegations of fraud, set out in the complaint, are not proven. And therefore the court concludes that the suit should be dismissed.

BOURQUIN, J.

MEMO.

In these suits to cancel United States land patents because secured by fraud, the presumptions are that the patentee did all required to secure patents and that they were guilty of no fraud, and the burden is on the Government to prove the fraud charged by evidence in quantity and quality that commands respect and produces conviction, or cancellation will not be decreed. The respect due to Government grants, over the seal of the United States, and the stability of titles dependent thereon, demand no less.

See U. S. v. Stinson, 197 U. S. 204,

U. S. v. Clark, 200 U. S. 608.

In the instant suit the burden is not sustained. The proof or evidence fails to measure up to the

standard. Strong suspicion may exist, but that is not the requisite proof and does not suffice.

It was apparent upon the face of the final proof the land involved was poor, the entryman poor, and his proof poor. But it satisfied the Government as compliance in good faith with the requirements of the homestead law, and patent issued in December, 1904. It is a case of a single man and common laborer, who worked for others.

The land was remote from public travel and neighbors. The presumption is though working for others and largely absent from the land, the defendant entryman made it his *home*. This well might be, though the Government witnesses in whatever occasional passages over the land they made may never have seen him nor have seen little evidences of inhabitancy. Their testimony is negative, their opportunities for observation few, their recollection poor, their testimony hesitant and drawn out, modified, strengthened and shaped by leading questions. Little credibility and weight can be given it in the main.

In certified copies from the General Land Office introduced by plaintiff, appear affidavits apparently from all the Government's witnesses at this trial. True, the *affidavits* were not expressly offered, but under the circumstances the court notes them. They inspired this suit. W. L. Kinsey made one in 1906 wherein he states he first saw the land in November, 1905, 17 months after final proof. He made another in 1909 wherein he

states he was on the land "within a few months *after* final proof," evidently *intended* to describe his *first* knowledge. At the trial he states he was first on the land in April or May, 1904, and *before* final proof. Strange, how Kinsey's knowledge increased as time passed! Such witnesses should not be used by any one—especially not by the Government. Gardipee, in an affidavit made in 1904, says the entryman's house had no roof until 1904, and he had frequently seen Cooper on or near the land. At trial he says the roof was on the house when he first saw it in 1902, and he never saw Cooper on or in vicinity of the land.

Gardipee, Jr., in an affidavit made in 1909, says he had seen Cooper on and near the land many times, and at the trial says he never saw Cooper on the land and only saw him on his, Cooper's, own land $\frac{3}{4}$ mile away.

The testimony of Cooper, Kirkland, Loss and Wise makes it to appear the entryman's house was habitable and by him inhabited before final proof. Wise lived in it with him for a short time. This must have been before final proof, for it was when Wise and the entryman built the reservoir, and that seems to have been before final proof. The entryman sold to the intervenor on the day of final proof and shortly left the country. It is not reasonable the entryman would build a reservoir after he sold the land. If Mahaffey, entryman, lived in the house then, unknown to the Kinseys and Gardipees, if the house was habitable then, it de-

stroys the value of their testimony insofar as such testimony denies residence and habitability in earlier years of which they know nothing or their opportunities of knowing were no better. The negative testimony of the Government in respect to the entryman's residence, for only *part* of the residence period, certainly does not so far outweigh (if it outweighs it at all) the presumption that the entryman resided upon the land *all* the required 5-year period *and* the defense's affirmative testimony to the point, that it satisfies the rule that alone warrants a decree of cancellation. It may be the fencing is not equal to that set up in the final proof, but in view of the land, the entryman, the final proof, and all else, that is not very material. "All fenced" in the proof is not a statement that there was "a wire fence constructed around the property," as charged in the complaint. The bluffs of ravines and other ^{natural} ~~material~~ obstructions may fence land. If the exact truth had been stated in respect thereto in the final proof, it is not probable the patent would not have issued. Fencing is not a statutory requirement as is residence—home—but only goes to show good faith in the matter of residence and use—cultivation or grazing. The entryman grazed the land, presumably and by proof at this trial, to the extent of his stock and necessities. Furthermore, while suspicion may attach to the transfer to the intervenor (if fraud had been made out), upon his evidence and that in his behalf he ought to be held a *bona fide* pur-

chaser. The purchase may have been of unbusiness-like quality, but the like is often done. Even good traders often take much on trust—place confidence upon or in unlikely men and statements.

The evidence herein (aside from the affidavits which though the court has noted it does not consider in determining credibility and weight) does not satisfy and persuade that the fraud alleged is proven; and were it otherwise, the intervenor satisfies and persuades that he is a *bona fide* purchaser entitled to protection.

(Indorsed): Title of Court and Cause. Memo. Filed July 30, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

Thereafter, on November 22nd, 1915, notice of motion to approve statement of evidence on appeal was duly filed herein as follows, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM MAHAFFEY,

Defendant.

NELSON COOPER,

Intervenor.

**NOTICE (OF MOTION TO APPROVE STATEMENT OF
EVIDENCE ON APPEAL.)**

To James A. Walsh, Esq., Attorney for Nelson,

Cooper, Intervenor in the above entitled action:

You will please take notice, that the undersigned, solicitor for the complainant and appellant herein, has this day lodged with the Clerk of the aforesaid court complainant's statement or proposed record of the evidence on appeal herein, and that at Helena, in the state and district of Montana, on the 30th day of November, 1915, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, the undersigned will ask the Court or Judge to approve the aforesaid statement of the evidence on appeal herein.

B. K. WHEELER,
United States Attorney, District of Mon-
tana, Solicitor for Complainant.

Due service of the foregoing notice is hereby admitted this 22nd day of November, 1915.

JAMES A. WALSH,
Solicitor for Intervenor.

(Indorsed): Title of Court and Cause. Notice. Files Nov. 22, 1915. Geo. W. Sproule, Clerk.

Thereafter, on December ²¹....., 1915, a statement of the evidence on appeal was duly approved and filed herein in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Defendant.

vs.

WILLIAM MAHAFFEY,

Defendant.

NELSON COOPER,

Intervenor.

STATEMENT OF THE EVIDENCE.

BE IT REMEMBERED that the above entitled action came regularly on for trial before the above entitled court, on the 1st day of July, 1915, the plaintiff being represented by Frank Woody, Assistant United States Attorney, and the intervenor, Nelson Cooper, being represented by James A. Walsh, Esq.,

And that thereupon the following proceedings were had and the following testimony was given by the respective witnesses, to-wit:

(TESTIMONY OF W. L. KINSEY FOR PLAINTIFF.)

W. L. KINSEY, being first duly sworn as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination.

(By MR. WOODY.)

My name is W. L. Kinsey. I reside at Sims, Montana, and have resided there about five years. I was acquainted with W. A. Mahaffey. I first

became acquainted with him in the spring of 1904 I think it was. I remember the occasion of Mahaffey making a homestead entry on lands in the neighborhood where I reside. I was not acquainted with him at the time he made the entry, but had met him several years before that near Cascade. I know the land described as the southeast quarter of the northwest quarter of section 10 and the south half of the northeast quarter of section 11, township north of range 3 west. That is the land on which Mahaffey made his homestead entry and known as the Mahaffey homestead. I first knew that land early in the spring of 1904. From March or April, 1904, up to the middle of June, 1904, I should say I saw the land several times. I used to ride through there for stock. I first saw the land in March or April, 1904, I was on the land, I rode over the land. During the balance of the year after June 15, 1904, and for two or three years after that I had occasion to be on the land frequently and pass by it frequently. I know where the house was built on the land. It was a log cabin. I saw the cabin on there, I think the cabin was on the place in the spring of 1904, but the roof was put on later. The cabin was on the land when I first went on the land in 1904. At that time it was an old cabin with a hole cut in it for a door and a window without any window in it and a floor without any floor, and it was what we call banked up. It was constructed out of logs with cracks in it. It had a dirt floor, and was not

chinked between the logs. There was a hole cut for a door and for a window but no floor in it. There was no stove pipe in the roof. The roof was just a board roof and was not battened or anything. It was not habitable or fit for a person to live in because there was no door and no window in it and cracks were on the sides so that you could put your finger through the logs. I first saw the cabin in 1904. I was not inside, just up to it on the outside. At that time there was no evidence that any one lived in the cabin at all. At that time no portion of the land had been cultivated, and no fencing on the land. Between April, 1904, and the middle of June, 1904, no fencing was done on the place and no cultivation of the land. From April, 1904, up to the middle of June, 1904, I saw this place every few days. My stock ran right across the range right in there, and my ranch is right near it you know. During that time I could cross back and forth over the land while I was driving stock. My stock ranged across it at that time. During the spring of 1904 Mahaffey was working for Cooper, in April I should say that early. How long prior to 1904 he had worked for Cooper I only know just by what I have heard. I mean Mr. Frank D. Cooper. I know Nelson Cooper. He is a son of Frank D. Cooper. Mr. Frank D. Cooper's place is about four miles east or southeast from the Mahaffey place.

Cross-Examination.

(By MR. WALSH.)

I said that Mahaffey worked for Cooper. I don't know how long, but I saw him there early in the spring working for Cooper. He worked probably three or four months, maybe longer, I couldn't say. It was early in April when I first saw him there. I first knew this land in 1904. That was the first time I heard it belonged to Mahaffey. I live right near the land and my stock ranged all over the country there. I have lived in that neighborhood since 1904. I rode over the land frequently. There was a fence east of the land on what is known as the Cooper ground, by the ranch, that is all. There was no public highway near the land. The land is partly rough and partly smooth laying land. It does not exactly lie in a canyon. There is some of it nice level land and some lays on the hillside. I was near the house quite a number of times. I said there was a single board roof on it. It was on all summer. I think the roof was on when I first saw it. There was no chinking between the logs. I saw no other buildings on the land except some lambing dens Cooper had on the land. I know they belonged to Cooper because Cooper's men were working there, and the foreman was working with the men right there, that is how I came to it. There might be a small reservoir there but I couldn't say. There is a ditch taken out there not over forty rods long on the Mahaffey land. There is alfalfa on the Frank

Cooper land there and the ditches were put on there. A small part of the Mahaffey land could be irrigated from the ditches. I believe there was a dam down in the creek, but I am not positive, but I know a ditch comes out. I have had occasion to be active against Mr. Cooper because they ranged me out. I don't know as I am the complaining witness in this case any more than the rest of them. I am not sure whether it was me or a man by the name of Jones who gave the information to Mr. Foley to commence this case. Mr. Cooper and I were never anything but friendly. I have no cause to want to get even with him. I was inside of the shack and looked to see if there was a stove pipe in the roof.

Re-Direct Examination.

(By MR. WOODY.)

From the time I first became acquainted with the land up to the middle of June, 1904, I never did see Mahaffey on the land.

(By MR. WALSH.)

At the present time I live about five and a half miles from this land. At that time I lived across country about a mile and a half. In June, 1904, I gathered berries right on that land.

(TESTIMONY OF JOHN GARDISPEE FOR PLAINTIFF.)

JOHN GARDISPEE, being first duly sworn as a witness for and on behalf of the plaintiff, testified as follows:

My name is John Gardispee. I live on Simms Creek. I do not know William A. Mahaffey, I

have seen him once. I know the land called the Mahaffey homestead. I saw it in 1902-3-4. I did not know Mahaffey at that time only I had seen him. He was cooking over at Frank Cooper's lambing pens. In 1902 I passed by this land. When I first saw the place in 1902 there was a cabin there. That was the only cabin I ever saw on the place except the lambing pens. It was a small log cabin ten by twelve and there was a board roof on it. That was the first time I saw it. It had a dirt floor and no door or windows. There were holes out for a door and windows but no door or windows in it. It was in May, 1902, when I first saw the land. From May, 1902, up to the middle of June, 1904, I was through there quite often hunting coyotes, and one thing and another, and I used to go over there helping them around doing some work. I rode over the land and past the cabin two or three times a year. The first time I saw the cabin in 1902 I did not notice chinking in it, you could see daylight through it. From May, 1902, the first time I saw the cabin, up to the middle of June, 1904, the cabin was not changed and excepting the roof was taken off of it. I never did see Mahaffey on the place. I never did see him but once and that was when he was cooking for Cooper. I never did see anybody living in the cabin. Between May, 1902, and the middle of June, 1904, I did not see any evidence around the cabin of any one living there. In May, 1902, there was none of the land cultivated, and I never saw

any fence only on one side of the land. The land was not fenced at all, there was a road through it. Up to the middle of June the land was never fenced. It remained in the same condition all that time. From May, 1902, up to the middle of June, 1904, none of the land was ever cultivated. No plowing was done on the land. There were no other buildings on the land. If there had been any other buildings there I would have seen them.

Cross-Examination.

(By MR. WALSH.)

I live about three miles northeast from the land. This land does not lie on any public road. There is a road going through there to go to town, to go to Sun River, where I used to trade. I used to pass through there going to Sun River in 1902, 1903 and 1904, oh, for a good many years. I used to trade at Cascade and I used to trade at Sun River too. I never saw Mahaffey but once. I am sure that it was in 1902 that I saw Mahaffey working for Cooper. That was at Bird Tail Creek, about three miles from the Mahaffey place. I first saw the cabin in 1902. I saw it in 1902, 1903 and 1904. It was afterwards torn down and moved to the Crown Butte Ranch. There was a roof on it when I first saw it. I was at the door but I never went inside because I could see inside. I did not see any other improvements on the land except the lambing pens. There was a reservoir east of the house which was built after I went there, I think in 1904 or 1905. There was a fence on the east

side of the land. The house was afterwards torn down, I think in 1904 or 1905. I cannot say exactly, I don't remember the exact date when it was torn down. The roof was taken off a while before the house was torn down. I passed by the place hunting coyotes for Frank Cooper. They told me there was a lot of coyotes around that place and I used to ride by there when I was hunting. I was not working for Cooper but was hunting coyotes for the bounty.

**(TESTIMONY OF JOHN GARDISPEE JR. FOR
PLAINTIFF).**

JOHN GARDISPEE, JR., being first duly sworn as a witness for and on behalf of the plaintiff, testified as follows:

My name is John Gardispee Jr. I am a son of the John Gardispee who has just testified. I live near Simms, Montana. I have lived there for the last twelve years. I knew William A. Mahaffey and first met him in 1902. I know the land called the Mahaffey homestead. I first saw that land in 1902, along about April. For the next three or four years my home was about two or three miles from the Mahaffey land. After April, 1902, during the next two or three years I was through that land several times, pretty often. I was across the land. I would be hunting cattle and horses and the cattle and horses ran in there quite a bit. For the next two or three years after 1902 I knew of only one fence the north and south line fence on the east side. There was no fence enclosing it so

as to keep stock out. It was open so that stock would range all over it. When I first saw the land in 1902 there was a cabin on it. It was an old log cabin ten by twelve feet or something like that. There was a board roof on it and I do not think it was chinked. There were holes for doors and windows but no doors and windows that I know of in it. It had a dirt floor. In 1902 when I first saw the cabin it was not fit for any one to live in. When I first saw the land in 1902 no one was living in the cabin or on the land. From 1902 up to the middle of 1904 no doors or windows were put in the cabin.

Q. Now, from 1902 up to June, 1904, was there ever anything else done to the cabin, was it chinked up or any roof or floor put on it? A. I never paid no attention to it.

Between April, 1902, and the middle of June, 1904, I never saw any one living in the cabin or on the land. I never did see Mahaffey on the place. I went over this place pretty regular, probably once a month. During the time from April, 1902, up to the middle of June, 1904, the place was never fenced so that I couldn't ride back and forth across it. During all of that time it remained open. None of the land was ever cultivated or plowed that I know of. From the month of April, 1902, up to the middle of June, 1904, no other building was ever built on the Mahaffey land. I never paid no attention to where he was. Mahaffey was a cook and I have seen him at Cooper's cooking several times, that is I heard him talk about it.

Cross-Examination.

(By MR. WALSH.)

I am thirty-two years old. I lived two or three miles from this land. I had no particular acquaintance with Mahaffey. I knew nothing about his business or for whom he worked, if anybody, only what I have been told. I never saw him in the employ of any person. I lived where I now live since 1902. Before that I lived about eight miles from the Mahaffey land. I saw the cabin on the Mahaffey land when I first went there. I stopped and looked at it. I went into it. The cabin was not quite half a mile from the east line of the land I think. I know where the east line is because there is only the one line between it and the Crown Butte ranch. I know where both corners of the section are. The house was in a coulee, and a stream running past there. I did not see any improvements there only a little piece of a ditch. There was a reservoir there, down a coulee below, east of the house. That ditch would cover a little of the land. When I first saw the house there was a single board roof on it. I never saw Mahaffey there. I was there pretty often during those years.

(TESTIMONY OF W. E. BENNETT FOR THE
PLAINTIFF).

W. E. BENNETT, being first duly sworn, as a witness for and on behalf of the plaintiff, testified as follows:

Direct Examination.

(By MR. WOODY.)

My name is William E. Bennett. I was at one time a Special Agent in the employ of the General Land Office. I was during the year 1909. In 1909 I made an examination of the lands embraced in the homestead entry of William A. Mahaffey, the land being situated in sections 10 and 11, township 19 north of range 3 west. The log cabin on the place was 10 by 14 at the time I made my examination of it. It was unchinked and left considerable space between the logs. There was no floor in the cabin, and no windows and no door, although the holes had been cut in the logs for both the window and door. The cabin was roofed with only a single board roof I believe. All the entry at that time was under enclosure, not fenced by itself, but it was,—the fence was where it just touched the place, if it touched it at all. I am not able to say whether it did or not, but the place itself was not fenced. The fence stood on some adjoining land, if I remember it correctly. There was no floor on the cabin. The roof was a single board roof, the cabin was not chinked and holes were cut for a door and window, but no doors or window put in. There was no frame even in the space for the door. I examined the door and window opening for the purpose of ascertaining whether there had ever been a door or window put in. I could see that there was no evidence that any door or window frame had ever been put in. I did not find any other

buildings on the land at this time. The land was enclosed in with land known as Mr. Cooper's field. The land was in an enclosure and there was no public road through there, although there was a trail there which was followed to go through that section of the country. *through*

Cross-Examination.

(By MR. WALSH.)

I never saw the land prior to 1909. I was there about the 5th or 6th of July, 1909 (Pointing to the witness W. L. Kinsey) Mr. W. L. Kinsey accompanied me. That was the Mr. W. L. Kinsey who accompanied me. I stopped at his place while I was there making the examination. I hired a team at Cascade, but used Mr. Kinsey's team either for making this examination or another later in the summer. He went to the land and pointed it out to me. There was no road through this land, just a trail. You could go into Mr. Kinsey's place through this field or go out from there coming out to Cascade. I am not sure whether it was the corner stone at the southwest corner of Section 11 we saw, but that is my recollection at this time. I know that we saw some corner stone and identified it sufficiently for me to be positive that it was the land. I think the cabin was in a canyon or gulch, at least it was not on the top of the claim. Mr. Kinsey showed me the cabin. I said the cabin was 10x12. I must have measured it because that was my report of the matter. It had a board roof and no floor. To the best of my recollection it did not

have cross piece to support a floor, but I would not swear positively to that. It was not chinked and no door or window. It is possible of course that they may have been there in the past. We went over the land a day. If I did see a reservoir there it didn't amount to enough to impress itself on my recollection. The stream they speak about was entirely dry that year and I would have noticed a reservoir, I believe. If there had been a reservoir below the house and going up to the house I would have seen it. There was a ditch there. As to how the fence was with reference to the lines I am unable to say at this time. I knew at that time positively because I ran out those fences part of them, but at this time I am unable to say. I said the land was in Cooper's enclosure. I know that. There wasn't any question about this being Cooper's enclosure. No one told me that, I knew it. Mr. Kinsey did not tell me.

(TESTIMONY OF FRANK KINSEY FOR THE PLAINTIFF).

FRANK KINSEY, being first duly sworn as a witness for and on behalf of the plaintiff, testified as follows.

Direct Examination.

(By MR. WOODY.)

My name is Frank Kinsey. I live at Simms just at present. That is in the neighborhood of St. Peter. I have lived eleven years in that vicinity. I know William A. Mahaffey who made a homestead entry on land in that vicinity. I first became acquainted with him in 1904. I know the land

he entered as a homestead. I did not become very much acquainted with that land until the spring of 1904. I had been over the land before that. I know where the cabin was on the Mahaffey homestead. I first saw that cabin in 1904, that was the first time I ever paid particular attention to it. That was about the fore part of April, 1904. I had been over the land about a year before that. When I saw it in 1904 I noticed the shape it was in. It was built of logs, logs that were two or three inches through, or something like that. It had no roof on it and no windows or nothing of that sort. There never had been any in it. It was not chinked between the logs. The space between the logs I would say were between three and four inches. It did not have any floor in it. There were places cut out for a door and window but no door or window were put in. I could tell from my examination that there had never been any door or window casing in it. From the first time I saw the cabin until the time Mahaffey made final proof I was on the claim several times. There was a board roof placed on the cabin after that. At the time final proof was made the cabin could not have been inhabited at all. It was not in such a condition that it could have been used for living purposes. Before final proof was made I never saw any other improvements on the place. No other buildings, fencing or corrals of any kind. I was back and forth across there while driving and hunting stock, it was open range. It was open so that stock of all

kinds ranged back and forth across the land. I know that Mahaffey was working for Mr. Cooper in the spring of 1904, helping lamb I think. Where he was working was about a half or three-quarters of a mile east of the Mahaffey homestead. I saw Mahaffey up there once or twice during the spring of 1904. I never did see Mahaffey on his land at any time prior to the time he made final proof.

Cross-Examination.

(By MR. WALSH.)

I live about two and one-half miles from this land. I first went there in 1904. Before that I lived up near Cascade, twelve or fifteen miles from the Mahaffey land. I first met Mahaffey in 1904 at this Cooper place, about half or three-quarters of a mile from the Mahaffey land. I saw him there once or twice but do not know how long he was there. I was first on the Mahaffey land the first part of April, 1904. I saw the house at that time. There was no roof on it, and no door or window. There were no fences. I did not see a reservoir or ditch there. There was a fence east of there but that fenced in the Crown Butte place where Mahaffey was working. I have been all over the land frequently. I had been over the claim before that but 1904 was the first time I paid any particular attention to the claim or to the house.

(MR. WOODY.)

I desire to offer in evidence certified copies of the record pertaining to the Mahaffey homestead entry. Included in this certified record are some

affidavits and reports made subsequent to the patent. I don't care to have them considered because I don't think they are proper; but I simply want the record beginning with the homestead application including the issuance of final receipt.

BY THE COURT: Very well.

“B”

MEL.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., September 29, 1909.

I hereby certify that the annexed copies are true and literal exemplifications of the originals on file and of record in this office.

IN WITNESS WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed at the City of Washington, on the day and year above written.

JOHN O'CONNELL,

Acting Recorder of the General Land Office.

(Seal)

8-174

4-007

1-27

HOMESTEAD.

Application)

No. 10048)

Land Office at Helena, Mont.,

April 25th, 1899.

I, William Mahaffey, of Cascade, Mont., do hereby apply to enter, under Section 2289 Revised Statutes of the United States, the S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 11; SE $\frac{1}{4}$ NE $\frac{1}{4}$ & NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10 in

township 19 N. of Range 3 W containing 160 acres.

WILLIAM MAHAFFEY

Land Office at Helena, Mont.,

April 27th, 1899,

I, George D. Green, Register of the Land Office do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior adverse right to the same.

GEORGE D. GREENE,

Register.

(Endorsed: 1-27 1-2. 4-007. No. 100048. Homestead Application. William Mahaffey, Cascade, Mont., April 25th, 1899. Sec. 10 & 11 Town. 19 N. Range 3 W. 14. Received U. S. Land Office Helena, Mont., April 27, 1899. Geo. D. Greene, Reg. 14-100.)

4-063.

1-25

HOMESTEAD AFFIDAVIT .

U. S. Land Office, Helena, Mont.,

April 25th, 1899.

I, William Mahaffey of Cascade, Mont., having filed my application No. 10048, for an entry under Section 2289 Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am over twenty-one years of age and a native born citizen of the United States, that my said application is honestly

and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to residence, settlement and cultivation necessary to acquire title to the land so applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make any agreement or contract in any way or manner, with any person, or persons, corporation, or syndicate whatsoever, by which the title I might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, and that I have not heretofore made any entry under the homestead laws, and am unable to appear at the district land office to make this affidavit on account of distance being 100 miles.

WILLIAM MAHAFFEY.

State of Montana,
Cascade County.—ss.

Sworn to and subscribed before me this 25th day of April, 1899, at my office at Great Falls, in Cascade County, Montana.

W. W. COCKRILL,
United States Commissioner, District
of Montana.

4-137 1-27 24

Receiver's Receipt No. 10048. Application No. 1048
HOMESTEAD.

Receiver's Office, Helena, Montana.

April 27th, 1899.

Received of William Mahaffey the sum of sixteen dollars—no cents; being the amount of fee and compensation of Register and Receiver for the entry of South half Northeast quarter Sec. 11; Southeast quarter Northeast quarter and Northeast quarter of Section 10, in Township 19 North of Range 3 W., MM, under Section 2290, Revised Statutes of the United States.

JOHN HORSKY,
Receiver.

\$16.00

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of the filing the affidavit, being also the date of entry. An abandonment of the land for more than six month works a forfeiture

of the claim. Further within two years of the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which his entry will be cancelled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.

4-369 1-19

HOMESTEAD PROOF.—TESTIMONY OF WITNESS.

CHARLES GILBERT, being called as witness in support of the Homestead entry of William Mahaffey, for S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 10, T. 19 N. R. 3 West, testified as follows:

Question 1. What is your name, age and postoffice address?

Answer. Charles Gilbert, age 62 years, P. O. Cascade, Montana.

Question 2. Are you well acquainted with the claimant in this case and the land embraced in his claim?

Answer. Yes, with both.

Question 3. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business.

Ans. No.

Ques. 4. State specifically the character of this

land—whether it is timber, prairie, grazing, farming, coal or mineral land?

Ans. Grazing land only.

Ques. 5. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. June, 1899, settled, built house and established residence.

Ques. 6. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact.)

Ans. Claimant is unmarried and had lived there since June, 1899.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement and for what purpose; and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

Ans. He has not been absent.

Ques. 8. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. None of the land is broken up, too rough, used for grazing entirely.

Ques. 9. What improvements are on the land and what is their value?

Ans. House, corral and all fenced, improvements are worth \$300.

Quest. Are there any indications of coal, salines,

or minerals of any kind on the homestead?
(If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. None.

Ques. 11. Has the claimant mortgaged, sold or contracted to sell any portion of said homestead?

Ans. No.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Claimant has acted in good faith.

CHARLES GILBERT.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this June 15, 1904, day of June 15, 1904, at my office at Great Falls, Cascade County, Montana.

C. H. BENTON,
Receiver.

20

4-309

1-27

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

CHARLES WISE, being called as witness in support of Homestead entry of William Mahaffey for S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11, NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N. R. 3 West, testifies as follows:

Question 1. What is your name, age and post office address?

Answer. Charles Wise, age 29 years, P. O. Cas-

cade, Montana.

Ques. 2. Are you well acquainted with the claimant in this case, and the land embraced in his claim?

Ans. Yes with both.

Ques. 3. Is said tract within the limits of any incorporated town or selected site of a city or town or used in any way for trade or business?

Ans. No.

Ques. 4. State specifically the character of this land—whether it is timber, grazing, prairie, farming, coal or mineral land?

Ans. Grazing only.

Ques. 5. When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In June 1899, settled, built house and commenced residence.

Ques. 6. Has claimant and family resided continuously on homestead since first establishing residence thereon? (If settler is unmarried state the fact).

Ans. He is unmarried and has lived there since June, 1899.

Ques. 7. For what period or periods has the settler been absent from the land since making settlement and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. He has not been absent.

Ques. 8. How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. None, land is too rought to cultivate, is used for grazing only.

Ques. 9. What improvements are on the land and what is their value?

Ans. House, corral and all fenced, improvements are worth \$300.

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?

Ans. No.

Ques. 11. Has the Claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not that I know of think not.

Ques. 12. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Claimant has acted in good faith.

his

CHARLES X WISE.

mark

R. E. WILLIAMS, Witness.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this June 15, 1904, day of June

15, 1904, at my office at Great Falls, Cascade County, Montana.

C. H. BENTON,
Register.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

WILLIAM MAHAFFEY, being called as a witness in his own behalf in support of Homestead entry No. 10048, for S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 10 T. 19 N. R. 3 West.

Question 1. What is your name, age and post office address?

Answer. William Mahaffey, age 49 years, P. O. Cascade, Montana.

Ques. 2. Are you a native born citizen of the United States, and if so, in what state or territory* were you born?

Ans. Born in Pennsylvania, U. S. A.

Ques. 3. Are you the identical person who made homestead entry No. 10048 at the Helena land office on the 27th day of April, 1899, and what is the true description of the land now claimed by you?

Ans. I am and claim the S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11, SE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 10, T. 19 N. R. 3 W.

Ques. When was your house built on the land and when did your establish actual residence thereon? (Describe the house and other improvements which you have placed on the land, giving total value thereof?)

Ans. Built in June, 1899, settled and established

residence at that time. House 16x18 feet, all fenced, corral, worth \$300.

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried state the fact.)

Ans. I am unmarried, have lived on the land since establishing residence.

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside on and cultivate the land during such absence?

Ans. Have not been absent.

Ques. 7. How much of the land have you cultivated each season and for how many seasons have you raised crops thereon?

Ans. Have not cultivated any of the land, it is too rough and has been used for grazing entirely.

Ques. 8. Is your present claim within the limits of an incorporated town or selected site for a city or town, or used in any way for trade or business?

Ans. No.

Ques. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable?

Ans. Grazing land only and used for that purpose.

Ques. 10. Are there any indications of coal salines, or mineral of any kind. (If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?)

Ans. No.

Ques. 11. Have you ever made any other homestead entry? (If so describe the same.)

Ans. No.

Ques. 12. Have you sold, conveyed or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. No.

Ques. 13. Have you any personal property of any kind elsewhere than on this claim. (If so describe the same and state where the same is kept.)

Ans. No.

Ques. 14. Describe by legal subdivisions or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans. None made.

WILLIAM MAHAFFEY.

I hereby certify that the foregoing was read to the claimant before being subscribed, and was sworn to before me this June 15, 1904, day of June 15, 1904, at my office at Great Falls, Mont., Cascade County, Montana.

C. H. BENTON, Register.

**FINAL AFFIDAVIT REQUIRED OF HOMESTEAD
CLAIMANTS.**

Section..... of the Revised Statutes of the
United States.

I. William Mahaffey, having made a homestead entry of the S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11 NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. No. 10, in Township No. 19 N., Range No. 3 West, subject to entry at Helena, Montana, under Section No. 2289 of the Revised Statutes of the United States, do now apply to perfect my claim thereto, by virtue of Section No..... of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and cultivated and resided upon said land since the 1st day of June, 1899, to the present time; that no part of said land has been alienated, except as provided in Section 2288, of the Revised Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government of the United States; and further that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

WILLIAM MAHAFFEY.

I, C. H. Benton, Register of Land Office do hereby certify that the above affidavit was subscribed and sworn to before me this June 15, 1904, day of June 15, 1904, at my office at Great Falls, Mont., in Cascade County, Montana.

C. H. BENTON,

Register.

(Endorsed: Homestead proof. Land Office at Great Falls, Montana. Original application No. 10048, Final Receipt No. 691. Approved, J. M. Burlingame, Register, C. H. Benton, Receiver.

4-140. 1-23.

Final Receivers Receipt No. 691. Application No. 10048.

HOMESTEAD.

Receiver's Office, Great Falls, Montana.

June 23, 1904.

Received of William Mahaffey the sum of six dollars no cents, being the balance of payment required for the entry of S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11; NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10 in Township 19 north of Range 3 West M.MM. containing 160 acres, under Section 2291 of the Revised Statutes of the United States.

C. H. BENTON,

\$6.00

Receiver.

\$1.00 Testimony fee received. Number of written words 444, Rate per 100 words 22 $\frac{1}{2}$ cents.

4-196 1-28

HOMESTEAD.

Land Office at Great Falls, Montana.

June 23, 1904.

Final Certificate)	(Application xxx
No. 691)	(No. 10048 xxx

It is hereby certified That, pursuant to the provisions of Section 2291 Revised Statutes of the

United States, William Mahaffey has made payment in full for S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 11, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, in Township No. 19 N., of Range No. 3 W. of the Montana Principal Meridian, Montana, containing 160 acres.

Now, therefore, be it known, That on presentation of this certificate to the Commissioner of the General Land Office, the said William Mahaffey shall be entitled to a patent for the tract of land above described.

J. M. BURLINGAME,

Register.

Endorsed) Final Certificate No. 691, Homestead Application No. 10048. Land Office at Great Falls, Montana. June 23, 1904. Sec. 10-11. Town. 19 N. Range 3 W. Approved Nov. 12, 1904. R. B. S. Clerk. Division C. Patented Dec. 31, 1904. Recorded Vol. 63, page 49, 14-100?

The foregoing certified record, after being introduced in evidence being marked "Plff's Exhibit 1."

Thereupon Plaintiff rested.

(INTERVENOR'S CASE)

**(TESTIMONY OF FRANK D. COOPER FOR
INTERVENOR).**

FRANK D. COOPER, being first duly sworn as a witness for and on behalf of the intervenor, testified as follows:

Direct Examination.

(By MR. WALSH.)

My name is Frank D. Cooper. During the last

three or four years, in the summer time, I have been around Great Falls and Glasgow. My family has been down in San Diego and I have been down there two or three months in the winter time. I claim my home is here. It used to be at St. Peter's Mission, that is where I used to vote, but I haven't voted since I left here. I lived at St. Peter's Mission since 1876. I have lived in Montana since 1872. I have been engaged in the stock business. I was a member of the legislature, and was also a county commissioner for Cascade County. I knew a man named William Mahaffey. I first knew him in either 1900 or 1901, I think 1900. I got acquainted with him after he took up that land, that is the first recollection I have of him, altho I might have met him the summer before, but I didn't recognize him until I saw him on that place of his. I know where the land in controversy is located. I think at that time I lived on my home place on Mission Creek about seven miles, the way the road runs from his place. They call it seven miles but I think it is about nine miles. There was a road between Mahaffey's land and Cascade. I have seen Mahaffey passing to and fro past my place ^{between} ~~and~~ his place and Cascade, about the same as a ranchman usually goes to town. I never had any conversation with him prior to the time he located on this land or prior to the time he made final proof. I was past that land I think in the spring of 1900. I saw Mahaffey there at that time. At that time I saw a house or cabin on the claim. My recollec-

tion is that it was not a very large cabin, a log cabin that he built himself. The furniture in it was about such furniture that a bachelor would have, iron bedstead and a small stove and such things as that. I was in there horseback and he was a new settler there, and I just stopped and talked to him for a few minutes. There was a board roof on the cabin. It had a floor in it. I went into the cabin to light my pipe. There was a corral there and three or four horses. The corral didn't amount to much just big enough to hold two or three horses. Soon after that he told me he was going to fence it, and wanted to know if he could join me on the end there, that is the east end of it, that would be eighty rods, and I finally sold him forty rods of fence, that would be about half of it. He paid me thirty-five dollars for it. It was in a kind of a little canyon and he wanted to fence the land on both sides to keep his horses in. There was a reservoir a few hundred yards above the east fence on the creek. It was a good reservoir about a hundred feet and a ditch coming out of it. It is right close there and any one passing up and down could not pass without seeing it and seeing the condition it was in. We herded sheep on that land before he took it up, after he took it up we recognized it the same as other ranches and never herded on it. I never had any lambing pens on that land. Mahaffey never worked for me directly. He may have helped some of my men running the sheep in the spring of the year. Those men I don't have

any knowledge of them and don't know when they come and when they go. I have a large number of men but don't know how many I had that spring. I have foremen with these outfits with these sheep. The foremen hire men without my knowing anything about it, and particularly at lambing time. I don't pay any attention to the men, only the head men that we have. I guess the first conversation I had with Mahaffey about purchasing this land was the 15th of June, 1904, the conversation was at Cascade some place. That is in this state. He struck me rather suddenly and he didn't want to sell it to me, he asked me where Nelson was. Nelson was my son. Nelson was not there and I probably told him where he was. Mahaffey said he wanted to leave there and wanted to sell out to him. I studied a little while and asked him what he wanted for it. That is as near as I can recollect. I cannot recall the exact conversation but that was the force. He wanted three hundred and fifty dollars, and at that time I was holding some of Nelson's money and it might have been left there by H. H. Nelson. I asked him what he wanted and he said three hundred and fifty dollars and he said he wanted to sell out to Nelson. I studied a little bit, and I finally—I had Nelson's money, I invested it for him, and I finally made out a check for him for three hundred dollars, and he went down to Bunnell's, the justice of the peace there, and made out a deed, and brought it back and I gave him three hundred dollars for it. Previous to and at

or about that time I had bought other lands of like character in that vicinity, I bought land of that kind from time to time. I bought Northern Pacific land. I think it was a little bit after they got an additional ten miles there, and the Northern Pacific came out there. Prior to that time I had bought some. I paid a dollar and a quarter an acre for the land I bought from the Northern Pacific. This Northern Pacific land was of the same character as the Mahaffey land. This railroad land was all around it. They are every odd section, and what the railroad company had there, the every odd section of land would be the average of what was left there. The Mahaffey land was in a little canyon, and was rocky on both sides. He just wanted to have a place to live, he was not particular about the soil. That land would not average as good as the railroad land. This Mahaffey land was not worth over three hundred dollars when I bought it and I don't think it is worth much over that now in that country up there. The rest of the land in Section 11, adjoining the Mahaffey land was railroad land and I bought it. I paid a dollar and a quarter an acre for that railroad land. Four hundred and eighty acres of that section I bought from the railroad company after the Mahaffey land was bought. I paid Mahaffey for the land with a check. At the time I bought the land from Mahaffey I had very little knowledge of it, more than what I had known. I noticed the house there at that time, and the improvements and the condi-

tions there, and passing on the road I would notice him continuously until he proved up, noticed him as I passed along the country there. At the time I bought this land I did not have any knowledge that Mahaffey had not entered the land in good faith and complied with the law by living upon it and placing improvements on it. I had very little knowledge of it more than what I had known before. I noticed the house there at that time and the improvements and conditions there, and passing on the road I would notice him there until he proved up. I don't know how often I would pass there but as often as a rancher usually goes to town. I saw him going to town. I asked him what shape it was in, and he made the remark, if I remember correctly—. If I remember correctly he lived there continuously. He didn't owe me anything and I thought it perfectly right if I was buying for Nelson. I was a little particular about it to and I considered it. At that time I did not have any knowledge that the Government claimed that he had not complied with the law as to residence and improvements, or that he had not entered the land in good faith and in everything complied with the law. I bought the land in good faith. Mahaffey told me he had made proof on it. Nelson got the money in this way. He was named after H. H. Nelson, and H. H. Nelson gave him one hundred dollars for naming him, and I was to look after the money until he was twenty-one years old. H. H. Nelson gave me the money when Nelson was

about two weeks old. H. H. Nelson and myself had lived neighbors together and we were always particularly friendly. After I got this money for Nelson, I think I bought calves with it and sold them. Some times the money was not used at all. Nelson is twenty-three now, he was about eleven when I bought the land. These calves, I think there was fifteen of them, I went across the river and bought. I kept them there a while. I did not like to keep them separate and then sold them. About the time I bought the land I think Nelson had to his credit \$300, or a little more.

Cross-Examination.

(By MR. WOODY.)

I knew Mahaffey personally in 1900. In 1900 I was down at his place. After I purchased the land for my son I was not down on the place for a long time, I dont know how long, but two or three years, it was a country that I didn't go into very much. When I did finally go down I found a cabin there. It was the same cabin that was there when I visited the place in 1900. When I was there in 1900 it was a log cabin with a roof on it and doors and windows in it. Mahaffey was living in it at that time. It had a rough board floor as I remember. I think that was along in the spring of the year. I didn't go around to see how much he had fenced. I did not go around the place,—the sides that is left—that fence that is left, that he bought it, but then I went through that, and then on the ridges I didn't go around to see what he had made

in the way of fences in addition to those what he had told me about, I didn't know anything about that in particular, nothing further than I could see. From 1900 up to the time I purchased I had not any knowledge of ever being around that corral. I owned the land adjoining Mahaffey's on the east. I had sheep there. The sheep camp was about a mile from the Mahaffey cabin. The sheep camp was about a quarter of a mile from the line of the Mahaffey land. During the years 1900-1901-1902 and up to and including 1904, Mahaffey was not in my employ. If Mahaffey was in my employ in 1900 he was under one of those in charge of one of the bands of sheep, he wasn't directly in my employ. On my land adjoining the Mahaffey we would run sheep there in the winter and would lamb there in the spring of the year. From 1900 to 1904 we used it every winter and I know we lambed there, but I am not positive whether every spring or not. I am not positive that we used it in the spring of 1904. It is pretty hard to tell whether I had occasion to visit the sheep camp that year or not. I don't know whether I did ^{or}~~not~~ not. I have sheep I think on Birch Creek, down in Valley County. I don't know whether I was down there in the lambing season or not. I had sheep camps at different places around the country, and had a foreman in charge of these different camps. Some years I went around and visited the camps, and some years I did not. I had other business to attend to and was not around those camps a great

deal. I had other business to attend to. My home place by the road was a little more than seven miles from the Mahaffey place. I had purchased lands in that vicinity and some under contract from the Northern Pacific Railway Company. From time to time when I was there I had purchased some homesteader's lands on which they had made their final proofs. During the time I was there I acquired about nineteen thousand acres. A large amount was purchased from homestead entrymen after they made entries and a great deal from the Northern Pacific Railroad. Mahaffey wanted my son Nelson to purchase the land, he never did want me to purchase it. The purchase was actually made and the deed executed on the 15th of June, 1904. I think that was on the same day that he made his final proof. At that time Mahaffey asked me to purchase it for Nelson. I don't know whether or not Mahaffey knew that Nelson had any money. He seemed to want him to have it. I think he knew he was named after Nelson and knew the circumstances. Prior to that time I had not purchased any other lands for my son Nelson. I don't remember the conversation particularly, but he wanted Nelson to have the land. I don't remember whether he knew that Nelson had money to purchase the land and that I had it. I don't remember the details of it but I know he did not want to sell it to me, he wanted to sell it to him and determined on it. I told him all right he could let him have it. It has been a good while

ago. I said that I was on the Mahaffey place in 1900. I may have been over the land before that but not any ways soon. I knew the land all around there in a general way. I think between 1900 and the time I bought the land I was there, but I am not positive, but I don't remember seeing him. I might have been there once afterward I am not sure about it. From the time Mahaffey made his settlement on the land up to the middle of June, 1904 I am not sure that I was on the land more than once. I knew all the land over in that country. I had lived there a good many years. I knew the general character of the land, I knew it in a general way. I never went to examine any of the lands I bought. I knew all the land all over that country. I had lived there a good many years. I knew the general character of that land and knew it in a general way. I never went to look at any land that I bought. One hundred and sixty acres. I knew the general character of the land and I never went to look over the lands and examine them completely at all. I never went to see any. I never saw a piece of land; never saw the railroad land, never examined any land of all the land I bought, but I knew the general character of all of that land. I knew the general character of the land, and I never went over the lands and examined them completely at all, I never went to see any, I never saw a piece of land, never saw the railroad land, never examined any land of all the land I bought. But I knew the general character of

all that land. I knew that 160 acres of land in that vicinity was worth \$300, the same as the railroad land. I considered all the land around there as worth about a dollar and a quarter an acre. When Mahaffey approached me it was in Cascade. I knew that he had made his final proof. I think at that time he had with him and showed me his final receipt. I probably asked him if he had his final receipt and he must have showed it to me because if he had not it I would not have bought it. I don't know whether he had a final receipt with him that day or not. Afterwards I got the patent from the land office, I got it some time. Whether I got the final receipt that day or not I don't remember, I got the final receipt some time or other. I did get the final receipt but whether that day or later on I don't remember. This money that I used to purchase the land with came from H. H. Nelson. He was not any relation to me or to my son. I got \$100. from H. H. Nelson for my son Nelson. When I purchased the land I paid over the original principal and the interest that had accrued on it so that it amounted to \$300. When I made the purchase I was acting as the agent of my son, I was acting for him. After the land was purchased and the deed executed and delivered nothing was done with it. Oh, yes, I suppose it was used in common with the other land. After it was purchased I suppose it was used in common with other lands, used it practically the same as the other lands. When it was purchased

it was not enclosed. I don't know as I built the fence after I got it, I don't remember whether I did or not, that I don't remember. I believe that I left it practically the same as it was. After the land was purchased I was on it at different times, but not until a long time after. Well, no, it wasn't enclosed with other lands of mine. I don't know as I built the fences after I got it. I don't know whether I did or not. That I don't remember. I believe I left it practically the same way it was, except what it would depreciate and what would be stolen and taken off. There is none of these places unless you have a man on them that would remain the same. They would soon carry it off. There was not a place but what I had some trouble with it. Everything was practically taken off except the house. What was lost was probably taken away. I don't know what did become of it. I didn't go out to look over the land until a long time after I purchased it. I didn't go out then to look it over in particular at all. I don't know whether at that time it was fenced separately or fenced with other lands. I don't know anything about grazing. I wasn't around there to know whether it was used or not.

Re-Direct Examination.

(By MR. WALSH.)

We lived on the road and Mahaffey drove past a good deal, and he used to take my son Nelson over to town a good deal and buy candy for him, and they were fishing together several times. I

don't know whether that was more than one summer or not. He liked Nelson and that is how they became acquainted some where along that line. When he would go over and get his mail they would go out fishing for a while and would come home in the evening.

Re-Cross-Examination.

I think Nelson was about 11 years old at that time, or in that neighborhood.

Thereupon counsel for defendant offered in evidence a deed from William Mahaffey to Nelson Cooper, which said deed is in the words and figures following, to-wit:

THIS INDENTURE, Made the 15th day of June, in the year of our Lord, one thousand nine hundred and four, between William Mahaffey, single man, party of the first part, and Nelson Cooper (Both of Cascade Co. Montana,) the party of the second part, WITNESSETH: That the said party of the first part, for and in consideration of the sum of One Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged does by these presents grant, bargain, sell, convey and confirm, unto the said party of the second part, and to his heirs and assigns, forever, the following described real estate, situated in the County of Cascade, and State of Montana, to-wit:

South half ($\frac{1}{2}$) of North west quarter ($\frac{1}{4}$), of Section Eleven (11), South east quarter ($\frac{1}{4}$) of

North east quarter ($\frac{1}{4}$), Northeast quarter ($\frac{1}{4}$) of Southeast quarter ($\frac{1}{4}$), Section ten (10), all in Township Nineteen (19) North Range Three (3), West, containing One hundred sixty (160) acres.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever; as well in law as equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof with the appurtenances.

TO HAVE AND TO HOLD, all and singular, the above mentioned premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns, forever. And the said party of the first part, and his heirs, does hereby covenant that they will forever warrant and defend his right, title and interest in and to the said premises, and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against the acts and deeds of the said party of the first part, and all and every person or persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, The said party of the first part has hereunto set his hand and seal the day and year above written.

WILLIAM MAHAFFEY. (SEAL)

Signed, Sealed and Delivered in the presence
of Will Bunnell.

State of Montana,

County of Cascade.—ss.

On this 15th day of June, in the year of our Lord one thousand nine hundred and four before me, Will Bunnell, a Notary Public in and for said county of Cascade, State of Montana, personally appeared William Mahaffey, a single man, of Cascade, Cascade County, Montana, known to me to be the person whose name subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this Certificate first above written.

WILL BENNETT,

Notary Public in and for Cascade
County, State of Montana.

(Notarial Seal)

(Endorsed: Warranty Deed. William Mahaffey to Nelson Cooper. Dated June 15, 1904. Recorded at the Request of.....
January 29th A. D. 1910, at 9:15 A. M. in 58 of Deeds page 283. David M. Wood, County Recorder. By Thomas T. Davies, Deputy.)

(Endorsed: No. 949. U. S. vs Mahaffey. U. S. Dist. Court, Montana.

Deft's Exhibit 2. Filed July 1, 1915. Geo. W. Sproule, Clerk.)

(TESTIMONY OF NELSON COOPER IN HIS OWN
BEHALF).

NELSON COOPER, being first duly sworn in his own behalf, testified as follows:

Direct Examination.

(By MR. WALSH.)

My name is Nelson Cooper and I am the intervenor in this case. I am 23 years old. I was 23 last October. I was acquainted with William Mahaffey. I did not know just where he did live but he used to come past our place with a black horse and cart. He used to come over for me to go fishing with him. He would always come from west of us. I know now that this land lies west of our place. In the summer time in nice weather I might have gone fishing with him every Sunday and sometimes once a month; or every Sunday. We were somewhat chummy as between boy and man. He always brought a handful of candy along and of course I was glad to go with him. We caught quite a few fish. He would bring me back home and then go on home alone, always going to the west. I was never out where he lived. I know now where the Mahaffey ranch is located, but I didn't know until after it was bought for me. I don't know when I first saw it, but it must have been sometime after it was bought for me. I don't remember of any improvements on it when I was there. I know that it was fenced and that there was a reservoir on it. It was a pretty good reservoir must have been 5 or 6 feet deep in places.

I went by it several times I used to go by there to get cattle out of the fields. I knew that other boys would go there to swim. There was a place about three quarters of a mile below where the boys would go in swimming whenever they felt like it. I know I went in there once one Sunday, with some other boys. I remember H. H. Nelson. I knew that my father had some money Mr. Nelson had given him for me. I have known about that ever since I can remember. I knew that my father was using it for me. I bought some calves with it at one time. My father heard about them and thought it would be a good experience for me so I went down and bought them. I paid I think \$13. or \$14. per head for them, some thing like that. I kept them around the ranch for a while and I think the next year sold them. I sold them to my father. I made \$80. or \$90. or \$100 anyway. I never had any knowledge that Mahaffey had not complied with the law as to residence or improvements on his homestead. I never had any knowledge that the Government claimed he had not complied with the law. Insofar as I am concerned in the transaction I was acting in good faith in making the purchase. My father told me what he had done with reference to buying the land for me as soon as he had bought it. I was glad to get because I thought 160 acres was a good deal of land. I thought I was getting to be a landed proprietor.

Cross-Examination.

(By MR. WOODY.)

The land was purchased for me by my father in 1904. I was 11 or 12 years old at that time. I am twenty three now. I knew that same night after the land was purchased that it had been purchased for me. It was after the land was purchased, after the purchase was completed that I first knew about it. I didn't know anything about his intention to purchase it before it was purchased. I must have known Mahaffey two or three or four years before the land was purchased. He was not in the employ of my father that I know of. He used to drive by our place on the way to town. He was not in my father's employ that I know of. I know where my father's camp is now in the neighborhood of the Mahaffey land, but I didn't know at that time. Before the purchase of the land I was never down to the Mahaffey homestead. I was not there until some time after. I remember about the reservoir being there and the ditches. I remember about a fence on one side, I don't remember about the others. I don't know whether or not there were any roads. After the land was purchased I guess it was used right in with all our other land. It was used by my father in connection with all this other land. I didn't pretend to make any use of it myself, only what few head of stock I had, but I don't suppose that would be much. My father used it in connection with his other land.

Re-Direct Examination.

I always had a few head of stock, I always kept a few head of cattle.

(TESTIMONY OF WILLIAM KIRKLAND FOR THE INTERVENOR).

WILLIAM KIRKLAND, being first duly sworn for and on behalf of the intervenor, testified as follows:

Direct Examination.

(By MR. WALSH:)

My name is William Kirkland. I live near Fraser, in Dawson County, Montana. From 1900 up to 1910 I resided in Cascade. I was acquainted with William Mahaffey. I knew him off and on since about 1900. I know the land known as the Mahaffey land. I may have passed over it before that. I saw that land when Mahaffey was there. There was a good log house on the land, I don't remember ever being in the house. It was a log house about 14 by 16 may be 18. It had a board roof and was pointed up; that was plastered between the logs. I saw a stove pipe through the roof. I saw a reservoir on the land, it was a pretty good reservoir and there was a ditch leading from the reservoir. There was a stream running through the land. The house was in what I would call a canyon. There was a fence on the east side of it, that is all the fence I ever noticed. I saw a fence running in the other direction but as to that being his fence I couldn't say. I worked for Frank

D. Cooper off and on from 1900 and 1911. I worked at different things. Part of the time I was acting foreman, part of the time choreboy, that is doing anything that he would put me to do. I think I was foreman over a bunch of men during the year 1904. I had charge of the lambing there. Mahaffey worked for me a short time in the spring of 1904. He did not work for me at any other time. I hired him and paid him off. I hired and fired my own men, and didn't report to Mr. Cooper until afterwards, probably quite a while afterwards. I suppose I reported the hiring of Mahaffey when we settled up. I don't think Mahaffey worked for me more than a week or ten days. At that time I was working at what was called the Benton road shearing sheep, and Mahaffey stopped there when he worked for me. He went there horseback. I guess he went away some nights there was a number of nights I was not there so I could not say. This was about three miles from his place. If he wanted to he could go to his place nights on horseback and return the next morning. I noticed Mahaffey traveling to and from the direction of his ranch, but cannot state where he was going either way. I noticed him passing more than one year, probably half a dozen times a year. I was never well acquainted with Mahaffey. I did not know him until he worked for me and then couldn't say that I was acquainted with him any more than to know him by name. I am a married man with a family.

Cross-Examination.

(By MR. WOODY.)

I worked for Mr. Cooper from 1900 up to 1910 or 1911. I couldn't say that I became acquainted with Mahaffey until he worked for me in 1904. That was the first time I became personally acquainted with him. I knew who he was from seeing him. Before the spring of 1904 I knew where his homestead was. I was down to his homestead. I probably had occasion to go by there. I don't remember if it was the spring of 1904 that I was at his cabin, it was before that I think. It was a log cabin 14 by 16 or 18 feet. It had a roof on it, a board roof. I couldn't say as to the floor. It had a door and window in it. It had a door casing and a window casing in it. It had a door so that it could be closed up. It was chinked up. There was a stove pipe going through the roof. I didn't say that he lived there at that time. I never say Mahaffey on the land, and I never saw him at the cabin. I hired Mahaffey to work for Cooper. I think he came to the shed that I was at. Cooper had a sheep camp not far from Mahaffey's homestead. I do not know whether Cooper used that sheep camp in 1904 or not. Sometimes he used it. He used it at times through the winter but there was times he didn't use it in the winter or summer time either. I know that Mahaffey was employed for a week or ten days, but at that particular time he was not working at that sheep camp. I don't know whether he worked at that

particular sheep camp in 1904.

(TESTIMONY OF RICHARD T. LOSS FOR INTERVENOR).

RICHARD T. LOOS, being first duly sworn, for and on behalf of the intervenor, testified as follows:

(By MR. WALSH.)

My name is Richard T. Loss. I live on a ranch 12 miles west of Cascade. I have lived there 25 years. I am a married man and have a family. I knew a man named William A. Mahaffey, I knew him 15 or 20 years. I know about his taking up a homestead. I am acquainted with that land. Before that he worked on the N. S. when I worked there. He worked there quite a while. That is 6 Miles west of Cascade. It is not a Cooper ranch. He worked there several years, three or four years. I know about the time he took up this land. He didn't work on the N. S. ranch after that. It has been several years ago since I quit working on the N. S. ranch. I have been by the Mahaffey land several times, I have been up in that country at different times. Some of that land is rough, some level ground and some a kind of sandy loam. It is only fit for grazing. It is the same class of land as the Northern Pacific land in that vicinity. I saw Mahaffey on the land once or twice. I saw a log shack, a cabin, on the land. I think it was about 12 by 14 by 16. It had a board roof. It was daubed or pointed as they call it. I was never in the house while he was there. I saw a stove pipe through the roof while he was there. There

was a door and window in the house. I was in the house in 1905 some time, after Mahaffey had made final proof. At that time there was a floor in the house. The door was unlocked. There was a fence on the east side of the land. There were other fences there but I didn't pay much attention to them only as I went through there with the sheep. There were no fences running at right angles with the fences on this side. There was no corral or stable there. There was a reservoir and one ditch there. At that time it was about as good a place as the ordinary Montana homestead. His place compared with the ordinary homestead of the Montana Settler. I knew Mahaffey for some years. Mahaffey was considered a pretty good man in that community. He stayed there and took care of that ranch in the winter when they had a good deal of stock there.

Cross-Examination.

(By MR. WOODY.)

I knew Mahaffey for about 20 years. From the time he filed on the land up to the time he made final proof I was across the land several times. I was there two or three times. I was really by his place twice. That was in 1903 and 1904. It was before he made his final proof. I saw Mahaffey there twice. I saw him around but didn't pay much attention to him, I was riding by, I was not down to his cabin at that time. Mahaffey was doing some thing around there. It was a log cabin, with a roof, door and window. It was a board

floor. It had door and window casings and a door and window in place. I was not inside the cabin at that time. I didn't notice any corrals there. There was a fence on the east side. I never saw Mahaffey there any other time. I don't know that Mahaffey was working for anybody at that time. He was not there all times.

(TESTIMONY OF CHARLES WISE FOR INTERVENOR).

CHARLES WISE, being first duly sworn for and on behalf of the intervenor, testified as follows: (By MR. WOODY.)

My name is Charles Wise. I live in Dawson County. From 1898 up to 1906 I didn't live in any particular place. I was all over the country. I lived in the vicinity of St. Peter's Mission a part of the time. I knew William A. Mahaffey. I knew him for quite a while. I am acquainted with the Mahaffey homestead up west of Cascade. I have been on the land but cannot remember the date, it has been so long ago. I saw Mahaffey living on the land. I guess I was there three or four times altogether while he was living there. These visits were all in one year. I don't remember what year it was. He had a log cabin on the place about 16 by 18 or some thing like that. It had one window and one door I think. It had a roof and a floor. I was in the house, I knew him and I visited him there. I stopped there about a week altogether, some thing like that, or five days. I ate there and slept there. He had a bed and table and chairs there, one chair I think, like you

would have in any common cabin. He had a small place boxed up for dishes and things, a bachelor's cupboard. The cabin was what you would call pointed I suppose, kind of muddled up like they do all those old cabins, just plastered between the logs. There was a stove pipe through the roof. There was some kind of little corral in the bend of the creek. It was a kind of little place where he kept two or three saddle horses. It was in the brush but I didn't pay much attention to it. I saw a reservoir there. I had something to do with the building of that reservoir, I worked on it. I helped him three or five days. During that time I ate and slept there. There was a ditch there. The dam across the reservoir was about five feet high, it was thrown across the creek or gulch. Mahaffey had two or three horses there at that time, that was all I saw. There was some fence there, but not a great deal, I never went around it. I did not notice any fence running across from the east fence. He had a little jag of wood laid up like a man would in any camp, a small one. There was part of a load of hay just thrown off for his horses I suppose.

Cross-Examination.

(By MR. WOODY.)

I was there several times all during one year. I don't know what year it was, but it seems to me like 1905. I am sure I never paid much attention and it was so long ago I have forgotten. I saw the

cabin at that time. It was chinked up, had a roof and a board floor, one window and one door casing and a door and window in place. He had some furniture, a stove, one chair and a little table he had made. I was there perhaps a half a dozen or three or four times that year, I cannot remember. It was along in the fall when I was there. Mahaffey was there every time I went there. He had no other buildings on the place, except that little cabin I have told you about. It was only a small corral, made of poles. It had no roof on it just put up for a horse corral. I don't know whether it was enclosed with a fence or not I never was around the fence. There was a fence on the east side. He had two or three head of horses there. For a living he worked at the N. S. ranch, but I don't know where he worked when he left there. I used to call on him because I knew him. I had no particular business there only when I worked on that reservoir. I think it was 1905 I was there as well as I can remember.

Re-Direct Examination.

(By MR. WALSH.)

I think it was after he made his final proof that I was there but I aint sure.

Intervenor rests.

REBUTTAL.

FRANK KINSEY, being called in rebuttal, testified as follows.

Direct Examination.

(By MR. WOODY.)

I am acquainted with Frank D. Cooper. From April, 1904, when I first knew the Mahaffey land up to the middle of June, 1904, I saw Frank D. Cooper on the Mahaffey land once. At that time he was right close to the cabin, probably seventy five or one hundred yards away. That was before Mahaffey made his final proofs. Before Mahaffey made his final proofs I saw Frank D. Cooper in and around there quite often.

Cross-Examination.

(By MR. WALSH.)

When I saw him at the cabin I was talking to him, about seventy five or one hundred yards from the cabin. I was coming across the creek and he was coming up the creek and we met. At other times I saw him in that vicinity, some times away a half a mile, at other times a mile and three miles, he was all over that country. At that time I lived two or two and a half miles away from the Mahaffey place. I spent quite a bit of time around the land riding. It was along in April, 1904, some time that I saw Cooper there. I couldn't say just what part of April it was. It was not in May but I think in April.

W. L. KINSEY, being called in rebuttal, testified as follows:

I know Frank D. Cooper and have known him since the fall of 1886. During the year 1904, before Mahaffey made his final proofs I never saw Cooper on the Mahaffey land but I seen him near it. I saw him in that vicinity. I know one time he was at my place and at another time I saw him at the Crown Butte ranch. The closest I saw him to the Mahaffey land that spring was probably half or three quarters of a mile.

Cross-Examination.

(By MR. WALSH.)

My place is about two miles from the Mahaffey place. I saw Mr. Cooper at my place one time. The next time I saw him at the Crown Butte ranch. The Crown Butte ranch adjoins the Mahaffey homestead.

JOHN GARDISPEE, being called in rebuttal, testified as follows, to-wit:

(By MR. WOODY.)

I have known Frank D. Cooper since 1900. During the years 1903 and 1904 I never saw Cooper on the Mahaffey land. I never seen him around that place only what they call the Crown Butte ranch. I know where his sheep camp was on the adjoining place, and I saw Cooper there. I saw him there in the spring of 1904, but I couldn't say how many times.

Cross-Examination.

(By MR. WALSH.)

I never saw him on the Mahaffey land. I saw him on his own ranch, the Crown Butte Ranch. That would be three quarters of a mile from the Mahaffey land.

JOHN GARDISPEE JR., being recalled in Rebuttal, testified as follows:

I know Frank D. Cooper and have known him since 1900. During the year 1903 and the spring of 1904 I never saw him on the Mahaffey place. I never saw him in that vicinity except on his own land, about three-quarters of a mile from the Mahaffey land.

That the foregoing is a narrative of all the testimony introduced and given on the trial of said action.

WHEREFORE plaintiff prays that the above and foregoing narrative of the testimony taken on the trial of said cause, be settled, approved and allowed by the above entitled court as a true, full and complete statement of all the evidence taken and given on the trial of said cause for use on the appeal taken to the United States Court of Appeals for the Ninth Circuit.

BURTON K. WHEELER,

United States Attorney,
Solicitor for Plaintiff.

(Certificate of Bourquin, D. J., Re Statement of Evidence on Appeal, etc.)

CERTIFICATE.

I, the undersigned, Judge of the District Court of the United States for the District of Montana, hereby certify that the foregoing statement of evidence is a true, complete and properly prepared narrative of all the evidence adduced on the trial of the above entitled action, and I do further certify that the same has been duly served and filed as required by the rules of the court.

Dated this 21 day of Dec., 1915.

BOURQUIN,
Judge.

(Indorsed) Title of Court and Cause. Statement of Evidence on Appeal. Filed Dec. 21, 1915. Geo. W. Sproule, Clerk.

That thereafter, on November 22nd, 1915, Petition for Appeal and Order allowing the same was duly filed and entered herein in the words and figures following, to-wit:

(PETITION FOR AN ORDER ALLOWING APPEAL.)
IN EQUITY NO. 949.

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Complainant.

vs.

WILLIAM A. MAHAFFEY,
Defendant.

and

NELSON COOPER,
Intervenor.

APPEAL AND ALLOWANCE.

The above named complainant, the United States of America conceiving itself to be aggrieved by the decree entered herein on the 31st day of July, A. D. 1915, in the above entitled proceedings, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and that a citation issue as provided by law, and that a transcript of the records and proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

B. K. WHEELER,
Solicitor for Complainant.

The foregoing petition is hereby granted and an appeal is allowed.

Dated this 22 day of November, 1915.

GEO. M. BOURQUIN,
Judge of said District Court.

(Indorsed) Title of Court and Cause. Appeal and allowance. Filed and entered Nov. 22, 1915. Geo. W. Sproule, Clerk.

That on Nov. 22nd 1915 an Assignment of Errors was duly filed herein in the words and figures following, to-wit:

IN EQUITY—No. 949.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant.

vs.

WILLIAM A. MAHAFFEY,
Defendant.

and

NELSON COOPER,
Intervenor.

ASSIGNMENT OF ERRORS.

The complainant in this action, in connection with its petition for an appeal herein, hereby makes the following assignment of errors, which it avers occurred in this cause:

1. The Court erred in finding the evidence taken

in said cause, at the trial thereof, was insufficient to sustain the allegations of the bill of complaint herein;

2. The court erred in ordering a decree herein in favor of the defendant and intervenor and against the complainant, dismissing complainant's bill of complaint;

3. The court erred in entering a decree herein in favor of the defendant and intervenor and against the complainant, dismissing the complainant's bill of complaint.

WHEREFORE, the said complainant, United States of America, prays that the said decree of the said District Court of the United States for the District of Montana, rendered and entered herein in the above cause, be reversed.

B. K. WHEELER,

United States Attorney,
District of Montana,
Solicitor for Complainant.

(Indorsed.) Title of Court and Cause. Assignment of Errors on appeal. Filed Nov. 22, 1915. Geo. W. Sproule, Clerk.

That on November 22nd, 1915, a Citation was duly issued herein which is hereto annexed and is in the words and figures following, to-wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant.

vs.

WILLIAM A. MAHAFFEY,

Defendant.

NELSON COOPER,

Intervenor.

CITATION ON APPEAL. (ORIGINAL).

To Nelson Cooper, Intervenor and Appellee, and
to James A. Walsh, Esq., his attorney and solicitor;
Greeting:

You and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein the United States of America is appellant and William Mahaffey and Nelson Cooper are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and reversed and speedy justice should not be done to the parties on their behalf.

WITNESS, the Honorable George M. Bourquin,
Judge of the United States District Court, District of Montana, this 22nd day of November, 1915.

GEO. M. BOURQUIN,

Judge of the District Court of the United
States, for the District of Montana.

Service of the within citation and receipt of a
copy thereof this 22nd day of November, 1915, is
hereby acknowledged and admitted.

JAMES A. WALSH,
Solicitor for Intervenor Nelson Cooper.

(Indorsed) No. 949. United States of Amer-
ica vs. William Mahaffey Defendant. Nelson
Cooper Intervenor. Citation on Appeal. Filed
Nov. 22, 1915. Geo. W. Sproule, Clerk.

That thereafter, on December 13th, 1915, an or-
der extending time to file record on appeal was en-
tered herein as follows:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Plaintiff.

vs.

WILLIAM A. MAHAFFEY,
Defendant.

NELSON COOPER,
Intervenor.

**ORDER EXTENDING TIME TO PREPARE RECORD ON
APPEAL.**

Upon good cause shown, it is hereby ordered that
complainant and appellant in the above entitled
-cause, may have thirty days in addition to the time
allowed by the rules of the court within which to

have prepared and certified up to the Circuit Court of Appeals the record on appeal herein.

Dated this 13th day of December, A. D. 1915.

GEO. M. BOURQUIN,
Judge.

(Indorsed) Title of Court and Cause. Order Extending time to prepare Record on Appeal. Filed Dec. 13, 1915. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk.

Thereafter, on January 4th, 1916, appellant duly served and filed herein its praecipe for a transcript of the record on appeal herein, together with affidavit of service thereon which is in the words and figures following to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant.

vs.

WILLIAM A. MAHAFFEY,
Defendant.

NELSON COOPER,
Intervenor.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Nelson Cooper, Intervenor and Appellee, and to James A. Walsh, his solicitor;

The undersigned, solicitor for complainant and appellant herein, hereby files and serves upon you its praecipe, in conformity with the rules of court,

indicating the portions of the record in the above entitled cause to be incorporated into the transcript on appeal herein, and which said portions of said record you are hereby notified the said complainant and appellant will incorporate and include in the record on appeal herein:

Said portions are as follows:

1. The Bill of Complaint.
2. The Subpoena in Equity.
3. Petition for Order directing service by publication.
4. Affidavit of Publication.
5. Order Pro Confesso as to the defendant William A. Mahaffey.
6. Petition in Intervention.
7. Amended Answer of Intervenor.
8. Replication to amended answer of intervenor.
9. Decree made and entered on July 31st, 1915.
10. Opinion and decision of the court rendered and filed July 30, 1915.
11. Notice of Motion to approve Statement of Evidence on appeal.
12. Statement of evidence on appeal prepared in narrative form in pursuance of the rules of court, and certified to by the Judge of said court as a correct, true and properly prepared narrative of the evidence.
13. Copy of appeal and allowance thereof by the court.
14. Assignment of errors accompanying appeal

and allowance.

15. Citation on appeal and admission of service by intervenor.

16. Order extending time for completing and transmitting the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

17. Copy of this praecipe.

The entire judgment roll as the same appears of record in the office of the clerk of the above entitled court is not included herein, as only those portions of such judgment roll which are specified in paragraphs numbered 1 to 9 inclusive of this praecipe are considered necessary for the purpose of the appeal herein.

BURTON K. WHEELER,

United States Attorney, District of Montana.

Solicitor for Complainant and Appellant.

State of Montana,

County of Lewis and Clark.—ss.

HOMER G. MURPHY, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, and that on the 4th day of January, 1916, he served the foregoing praecipe upon James A. Walsh, solicitor for Nelson A. Cooper, intervenor and appellee, in the above entitled cause, by leaving in the office of said James A. Walsh, situated in the Power Block in the City of Helena, State of Montana, a full complete, and true copy of the said praecipe, at the hour of 10:30 A. M.; the said office being

then closed and no one being therein at said time and place; and a said copy being left in said office by being inserted under the door thereof; that the office aforesaid is the place of business and the office of the said James A. Walsh, solicitor as aforesaid.

HOMER G. MURPHY.

Subscribed and sworn to before me this 4th day of January, 1916.

S. C. FORD,

(Notarial Seal)

Notary Public for the State of Montana, residing at Helena. My commission expires Sept. 10, 1918.

Endorsed: Filed Jan. 4, 1916. Geo. W. Sproule, Clerk.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,

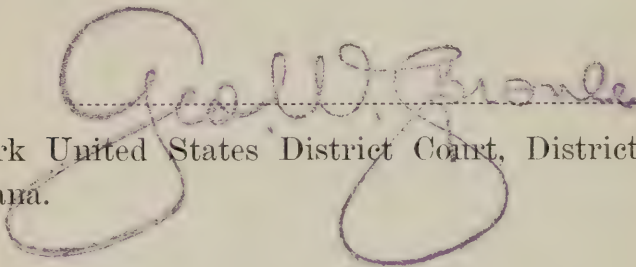
District of Montana.—ss.

I, George W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting ofpages, numbered consecutively from 1 to , inclusive, is a true and correct transcript of the pleadings, process, orders, decree, decision, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of appellant for said record on appeal, including said praecipe, and of the whole thereof,

as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of fifty and 40/100 dollars and have been made a charge against appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 14th day of January, A. D. 1916.


Clerk United States District Court, District of Montana.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,	}
<i>Appellant,</i>	
vs.	
WILLIAM A. MAHAFFEY,	
<i>Defendant,</i>	}
NELSON COOPER,	
<i>Appellee.</i>	

BRIEF OF APPELLANT.

BURTON K. WHEELER,
United States Attorney,

HOMER G. MURPHY,
FRANK WOODY,
Assistant United States Attorneys.

Filed
APR 30 1916
F. D. Mondragon
Clerk.

No. 2738.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM A. MAHAFFEY,
Defendant,

NELSON COOPER,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana, on the 31st day of July, 1915, in favor of the appellee and against the appellant and dismissing the appellant's bill of complaint (Tr. p. 37).

This action was commenced by the appellant against the defendant William A. Mahaffey for the

purpose of having cancelled and set aside, on the ground of fraud, a certain patent for lands theretofore issued to the defendant, the bill of complaint having been filed on December 7th, 1909.

The bill of complaint (Tr. pp. 2-16), alleges in substance; that the appellant was, prior to the 27th day of April, 1899, the owner in fee of certain lands situated in the state and district of Montana, and that on the 27th day of April, 1899, the defendant, William A. Mahaffey, entered said lands under the homestead laws by making and filing in the United States land office at Helena, Montana, his application to enter said lands together with a homestead affidavit and a non-mineral affidavit (Tr. pp. 2-5); that after the expiration of five years he made and submitted to the land office final proofs thereon, consisting of his own affidavit and deposition and the affidavits and depositions of two witnesses, and received from the officers of the land office a final receipt and certificate, and thereafter on the 31st day of December, 1904, a patent was issued to him by the United States for said lands (Tr. pp. 5-9); that in said final proof affidavits and depositions the defendant and his two witnesses testified and stated that the defendant had actually resided on said lands continuously since June, 1899, and that he had placed improvements upon said land of the value of \$300.00, and that he had constructed a house upon said land sixteen feet by eighteen feet, and had constructed a wire fence around said land and had constructed corrals thereon (Tr. pg. 7);

that the final proof affidavits and depositions of the defendant and his two final proof witnesses were false, fraudulent and untrue, as was then and there well known to the defendant and said final proof witnesses, in this, that the defendant had not established his residence upon said lands, or any portion thereof, during the month of June, 1899, or at any other time or at all, and that the defendant had not, at the time of the making of said final proofs, resided on said lands, or any part thereof, continuously, or in any other manner, or at all, since the month of June, 1899, or at any other time or at all, and had not then, or at any other time, built a house sixteen feet by eighteen feet, and that he had not fenced said lands with a fence, and had not built any corral or fence whatever, and that he did not then and there, or at any other time, have improvements upon said lands of the value of \$300.00, or any other value or amount whatever (Tr. pp. 10-11); that the officers and agents of the United States, believing the statements contained in the final proof affidavits and depositions of the defendant and his two final proof witnesses, were misled and deceived thereby, and were thereby induced to issue said final receipt and certificate and said patent (Tr. pp. 12-13).

On March 26th, 1915, an order pro confesso was entered as to the defendant Mahaffey (Tr. pp. 24-25).

On September 4th, 1912, Nelson Cooper filed his petition to intervene in said cause (Tr. pp. 25-30), and thereafter on December 20, 1912, filed his amended answer in intervention (Tr. pp. 31-35).

The answer in intervention admits the allegations of the bill of complaint with reference to the ownership of the land, the entry by the defendant, the making of the final proof on said entry and the issuance of the final receipt and certificate and the issuance of patent to the defendant, but denies that the proofs with reference to establishment of residence, upon the lands by the defendant, his residence thereon, and the kind and value of the improvements made thereon were false, fraudulent or untrue (Tr. pp. 31-32).

The answer in intervention also alleges, in substance; that after the defendant Mahaffey had made his final proof, and while he was in possession of said land, the intervenor, in good faith and for a valuable consideration paid by him to the defendant, and without any notice or information that the defendant Mahaffey had not, in all things, complied with the homestead laws and without notice or information that the complainant claimed that said Mahaffey had not, in all things, complied with the homestead laws, purchased the said lands from said defendant Mahaffey, and the said Mahaffey executed a deed conveying said lands to the intervenor and delivered the same to the intervenor and received the purchase price for said lands (Tr. pg. 33); and that at the time the intervenor purchased said lands, paid the consideration therefor, and received the deed thereto, he had no notice or information that the defendant had not, in all things complied with the law in procuring title to said lands, or that the complainant claimed that there was any fraud com-

mitted by the said Mahaffey in procuring title to said lands (Tr. pg. 34).

The answer in intervention also alleges that after purchasing said lands he entered into a contract to sell and convey the same to one George Heaton for a valuable consideration, which was paid to the intervenor by said Heaton, and that said Heaton is in possession of the said lands under said contract (Tr. pg. 34).

To the answer in intervention a replication was filed by the complainant on December 23rd, 1912 (Tr. pp. 35-36).

On July 1, 1915, said cause came regularly on for trial before the court, evidence being introduced by complainant and intervenor (Tr. pp. 44-102), and said evidence having been considered by the court, the court, on July 30, 1915, duly rendered and filed its decision and opinion in said cause (Tr. pp. 33-42), and on July 31, 1915, a decree was duly made and filed in said cause in favor of the intervenor and against the complainant and dismissing the complainant's bill of complaint (Tr. pg. 37).

With the petition for appeal the following assignment of errors was filed (Tr. pp. 104-5).

ASSIGNMENT OF ERRORS.

1. The court erred in finding the evidence taken in said cause, at the trial thereof, was insufficient to sustain the allegations of the bill of complaint;

2. The court erred in ordering a decree herein in

favor of the defendant and intervenor and against the complainant, dismissed the complainant's bill of complaint;

3. The court erred in entering a decree herein in favor of the defendant and intervenor and against the complainant, dismissing the complainant's bill of complaint.

ARGUMENT.

There are only two questions to be determined on this appeal. One whether or not the evidence is sufficient to sustain the allegations of the bill of complaint with reference to the fraud of the entryman and defendant Mahaffey, and the other whether or not, if the evidence is sufficient to sustain the allegations of the bill of complaint, the evidence introduced by the intervenor in support of the allegations of the answer in intervention is sufficient to sustain the same and show the intervenor to have been a purchaser in good faith for a valuable consideration without notice of the fraud committed by the defendant entryman.

In order to determine whether or not the court erred in finding and holding that the evidence was insufficient to sustain the allegations of the bill of complaint it is necessary to examine and analyze the evidence introduced by the complainant.

The complainant introduced in evidence the affidavits and depositions made and given by the entryman Mahaffey and his witnesses before the register

of the Great Falls land office on June 15, 1904, in support of the entryman's final proof (Tr. pp. 63-71).

In the final proof affidavit and deposition of the entryman (Tr. pp. 68-70), he stated that he built the house on the land in June, 1899, and settled and established his residence on the land at that time (Tr. pp. 68-69); that the house was 16x18 feet, and that the land was all fenced, a corral on the land and all of the improvements were worth \$300.00 (Tr. pg. 69); that he had resided on the land continuously since establishing his residence thereon in June, 1899, and had never been absent therefrom (Tr. pg. 69).

In the final proof affidavit and deposition of the final proof witness Charles Gilbert (Tr. pp. 63-65), he stated that the entryman Mahaffey built his house on the land in June, 1899, and at the same time settled on the land and established his residence thereon (Tr. pg. 64); that the entryman had resided continuously on the land since June, 1899, and had never been absent therefrom (Tr. pg. 64); that the entryman had a house and corral on the land and the land was all fenced, all of the improvements being worth \$300.00 (Tr. pg. 64);

In the final proof affidavit and deposition of the final proof witness Charles Wise (Tr. pp. 65-67), he stated that the entryman settled on the land, established his residence thereon and built his house thereon in June, 1899 (Tr. pg. 66); that the claimant had lived on the land since June, 1899, and had never been absent therefrom (Tr. pg. 66); that the entryman had a house and corral on the land and the land was all

fenced and all of the improvements were worth \$300.00 (Tr. pg. 67).

The bill of complaint alleges that the foregoing testimony of the entryman and his final proof witnesses was false, fraudulent and untrue, and alleges:

1. That the entryman Mahaffey did not establish his residence on the land in June, 1899, or at any other time or at all;

2. That at the time of making the final proofs Mahaffey had not resided on the land continuously, or in any other manner or at all, since June, 1899, or at any other time;

3. That he had not built a house 16x18 feet on the land;

4. That he had not enclosed the land with a fence;

And to support these allegations of the bill of complaint the complainant introduced the following evidence;

W. L. Kinsey, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 44-48);

That he first saw the land in March or April, 1904; from March or April, 1904, up to the middle of June, 1904, he saw the land several times, riding over it for stock; that during the next few years after June 15, 1904, he had occasion to be on the land frequently and pass by it frequently; that when he first was on the land in the spring of 1904, there was on the land an old log cabin with holes cut in it for a door and

window, but without any door, window or floor; it was constructed of logs with cracks in it (Tr. pg. 45), and was not chinked between the logs, and there was no stove pipe in the roof (Tr. pg. 45); it had a board roof which was not battened or anything; it was not habitable or fit for a person to live in because there was no door and no window in it and the cracks were in the sides so you could put your fingers through; that when he first saw it in 1904, he was not inside of it but just up to it; at that time there was no evidence that any one lived in it, and there was no fencing on the land; that between April, 1904, and the middle of June, 1904, no fencing was done on the land, and that during that time he was on the place every few days; during that time he could pass back and forth over the land while driving stock and his stock ranged all over it at that time (Tr. pg. 46); that he lived near the land and his stock ranged over that country; that he has lived in the neighborhood since 1904 and rode all over the land frequently; that there was a fence east of the land on what was known as the Cooper land, that was all; that he was near the house quite a number of times; that there was no chinking between the logs; that he saw no other buildings on the land except some lambing pens Cooper had on the land; that he knows they belonged to Cooper because Cooper's men were working there and the foreman was working with the men (Tr. pg. 47); that he never saw Mahaffey on the land; that he lived about one and one-half miles from the land across country,

and in June, 1904, gathered berries right on the land (Tr. pg. 48).

John Gardispee, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 48-51);

That he saw the land in 1902, 1903 and 1904; that he first passed by the land in 1902 and there was a cabin on it then and that was the only cabin he ever saw on the land except some lambing pens; that it was a small log cabin about ten by twelve feet with a board roof on it the first time he saw it; it had a dirt floor and no door or windows; holes were cut for a door and a window, but no door or window in it; that it was in May, 1902, when he first saw the land, and from that time until the middle of June, 1904, he was through the land quite frequently hunting coyotes and going over to help them around doing some work; that when he first saw it in 1902 he did not notice any chinking in it and he could see daylight through it; that from May, 1902, when he first saw it up to the middle of June, 1904, the cabin was not changed, except that the roof was taken off; that he never saw Mahaffey on the land, never saw him but once and that was when he was cooking for Cooper; that he never saw anyone living on the place or in the cabin; that between May, 1902, and the middle of June, 1904, he did not see any evidence around the cabin of any one living there (Tr. pg. 49); that he never saw any fence on the place except a fence on one side of the land (Tr. pp. 49-50); that up to the middle of June, 1904, the land was never

fenced and there was a road through it, the land remaining in the same condition all of that time (Tr. pg. 50); that he lived about three miles from the land; that the land does not lie on any public road, but there was a road going through there to Sun River where he traded; that he passed through the land in 1902, 1903 and 1904, going to Sun River (Tr. pg. 50); that he first saw the cabin in 1902, and saw it in 1902, 1903 and 1904; there was a roof on it when he first saw it; he was at the door, but never went inside of the cabin because he could see inside; he saw no other improvements on the land except the lambing pens; there was a reservoir east of the house which was built after he went there in 1904 or 1905 (Tr. pg. 50); there was a fence on the east side of the land; he passed the place hunting coyotes for Frank Cooper; they told him there was a lot of coyotes around the place and he used to ride by there when hunting; he was not working for Cooper, but was hunting coyotes for the bounty (Tr. pg. 51).

John Gardispee Jr., a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 51-53);

That he knew Mahaffey and first saw the land along about April, 1902; that for the next three or four years his home was about two or three miles from the Mahaffey land; that after April, 1902, for the next two or three years he was through the land several times, pretty often; he was across the land hunting cattle and horses and the cattle and horses ran in there on

that land; that for the next two or three years after 1902, he knew of only one fence, the north and south line fence on the east side (Tr. pg. 51); that there was no fence enclosing it so as to keep stock out and it was open so that stock could range all over it; when he first saw the place in 1902 there was a cabin on it, an old log cabin ten by twelve feet or something like that; it had a board roof but does not think it was chinked; there were holes for doors and windows but no doors or windows that he knew of; it had a dirt floor; in 1902 when he first saw the cabin it was not fit for anyone to live in and no one was then living in the cabin; from 1902 up to the middle of June, 1904, the place was never fenced so that he could not ride back and forth across it and during all of that time it remained open (Tr. pg. 52); he saw the cabin when he first went there, stopped and looked at it and went in it; when he first saw it there was a single board roof on it; he never saw Mahaffey there and was there pretty frequently during those years (Tr. pg. 53);

Frank Kinsey, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 56-59);

That he had been over the Mahaffey land before 1904, but did not become acquainted with the land until the spring of 1904, about the fore part of April, when he first saw the cabin; he had been over the land about a year before that; the cabin was built of logs that were two or three inches through, or something

like that; it had no roof on it and no doors or windows, and there had never been any in it; it was not chinked between the logs and the spaces between the logs were two or three inches; it had no floor and while there were holes cut for a door and window there was no door or window put in; that he could tell from his examination that there had never been any door or window casing in it; that he was on the claim several times from the time he first saw the cabin up to the time Mahaffey made final proof; at the time final proof was made the cabin could not have been inhabited at all it was in such a condition that it could not have been used for living purposes; that before final proof was made he never saw any other improvements on the place, no buildings or fences of any kind; he was back and forth across the land while driving and hunting stock, it was open range (Tr. pg. 57); it was open so that stock of all kinds ranged back and forth across the land (Tr. pp. 57-58); he never saw Mahaffey on the land at any time prior to the time he made final proof (Tr. pg. 58); he lived about two and one half miles from the land; first saw the cabin the first part of April, 1904, and at that time there was no roof on it and no door and no fences; there was a fence east of there, but that fenced in the Crown Butte Ranch where Mahaffey was working; that he had been all over the land frequently; that he had been over the land before 1904, but 1904 was the first time he ever paid any particular attention to the claim or to the house (Tr. pg. 58).

W. E. Bennett, a witness called on behalf of the complainant, testified, in substance, as follows (Tr. pp. 54-56);

That during the year 1909, he was a Special Agent for the General Land Office; that he made an examination of the Mahaffey homestead entry in July, 1909; that he found a log cabin on the place at that time ten by twelve feet; it was unchinked and left considerable space between the logs; there was no floor in the cabin and no door or windows, although the holes had been cut in the logs for both a window and door; the roof was a single board roof; at that time all of the entry was under enclosure, not fenced by itself, but the fence was where it just touched the place if it touched it at all, but the place was not fenced, the fence stood on some adjoining land; there was no floor in the cabin, the cabin was not chinked and holes were cut for a door and window and no door or window in it, and there was no frame even in the space for the door; I examined the door and window openings to ascertain whether there had ever been a door or window put in and could see that there was no evidence that any door or window frame had ever been put in (Tr. pg. 55); the land was enclosed with land known as the Cooper field, and there was no public road through there although there was a trail there which was followed to go through that section of the country (Tr. pg. 55); that he was there about the 5th or 6th of July, 1909, with W. L. Kinsey; the cabin was ten by twelve feet and I must have measured it

because that was my report of the matter (Tr. pg. 55); to the best of his recollection it did not have cross pieces to support a floor, but he would not swear positively as to that; it was not chinked and had no door or window; as to how the fence was with reference to the lines he was unable to say at this time, but he knew at that time positively because he ran out those fences; the land was in Cooper's enclosure, I know that; there was not any question about this being Cooper's enclosure; no one told me that, I knew it (Tr. pg. 56).

We submit that the evidence of these witnesses is sufficient to sustain the allegations of the bill of complaint in every respect.

With reference to the establishment of residence and residence of the entryman Mahaffey on the land the evidence was in substance as follows:

W. L. Kinsey testified that he lived about one and one-half miles from the Mahaffey entry (Tr. pg. 48); that he first saw the cabin in March, 1904, and between that time and the middle of June (when Mahaffey made his final proof), he was on the place frequently (Tr. pg. 45), every few days (Tr. pg. 46); that there was an old log cabin on the place which had holes for a door and window but no door or window and no floor (Tr. pg. 45); there was no chinking between the logs and no stove pipe (Tr. pg. 48); that it was not habitable or fit for a person to live in (Tr. pg. 46); that between April, 1904, and the middle of June,

1904, he was on the place every few days and never saw Mahaffey on the place.

John Gardispee testified that he lived about three miles from the land (Tr. pg. 50); that he saw the land in 1902, 1903 and 1904; that there was a small cabin on it about 10x12 the first time he saw it (Tr. pg. 49); that the cabin had a dirt floor, holes cut for a door and window, but no door or window in it (Tr. pg. 49); that from the time he first saw it up to the middle of June, 1904, he was on the place frequently (Tr. pg. 49); when he first saw the cabin in 1902 there was no chinking between the logs and he could see daylight through it (Tr. pg. 49); from the time he first saw the cabin in 1902 up to the middle of June, 1904, there was no change in the cabin, except that the roof was taken off (Tr. pg. 49); that he never saw Mahaffey on the place or any evidence of anyone living in the cabin (Tr. pg. 49).

John Gardispee Jr. testified that he lived two or three miles from the Mahaffey homestead (Tr. pg. 51); that he first knew the land in April, 1902, and for the next two or three years went over the land frequently hunting stock which ranged across the land (Tr. pg. 51); when he first saw the cabin in 1902 it was an old log cabin about 10x12 feet with a board roof, not chinked, with holes cut for a door and a window but without a door or window and with a dirt floor (Tr. pg. 52); that it was not fit for anyone to live in and no one was living in the cabin or on the land (Tr. pg. 52); that from 1902 up to the mid-

dle of June, 1904, he never saw anyone living in the cabin or on the land and never did see the entryman Mahaffey on the place although witness was on the land frequently, probably once a month (Tr. pg. 52); that the first time he saw the cabin in 1902 he stopped and looked at it and went inside (Tr. pg. 53).

Frank Kinsey testified that he lived about two and one-half miles from the Mahaffey land (Tr. pg. 58); that he first saw the cabin in the fore part of April, 1904 (Tr. pg. 57); at that time it had no roof on it and no door or window in it and there never had been any in it (Tr. pg. 57); that it was not chinked and had spaces between the logs of two or three inches (Tr. pg. 57); there was no floor in it and there were holes cut for a door and window with none in it (Tr. pg. 57); that he could tell from his examination that there never had been any door or window casings in the cabin (Tr. pg. 57); that between the time he first saw the cabin and the time Mahaffey made his final proof witness was on the place several times (Tr. pg. 57); that at the time Mahaffey made his final proof the cabin could not have been inhabited as it was in such a condition it could not have been used for living purposes (Tr. pg. 57).

Two of these witnesses, John Gardispee and John Gardispee Jr., knew the land and cabin from April, 1902, up to the middle of June, 1904, when the entryman Mahaffey made his final proof, while the other two knew the land and cabin from the first part of April, 1904, up to the time of the making of such

final proof. All of them were on and over the land and passed by the cabin frequently during the time they knew it, and they all agree as to the condition of the cabin, that it was unchinked, without doors or windows and with a dirt floor, and was not habitable or fit to live in, and none of them ever saw the entryman Mahaffey on the place at any time.

W. E. Bennett, who was a Special Agent of the General Land Office, made an examination of the land and cabin in the early part of July, 1909. He testified that he found on the land an old log cabin 10x12 feet; that it was unchinked with considerable space between the logs; that there was no floor in the cabin and no doors or windows although holes had been cut in the logs for both a door and window (Tr. pg. 55); that there were no door or window frames in the cabin and that he examined the door and window openings for the purpose of ascertaining whether there had ever been a door or window put in and could see that there was no evidence that any door or window had ever been put in the cabin (Tr. pg. 55).

The testimony of the witness Bennett shows that in July, 1909, when he made his examination, the cabin was in exactly the same condition as the testimony of the witnesses Gardispee, Gardispee Jr., W. L. Kinsey and Frank Kinsey shows the cabin to have been in for a number of years prior to and at the time the entryman Mahaffey made his final proof.

The intervenor introduced four witnesses for the purpose of showing that the cabin was in a habitable

condition and that the entryman resided on the entry.

Frank D. Cooper, father of the intervenor, and who purchased the land for the intervenor, testified that he lived at Mission Creek between 7 and 9 miles from this land (Tr. pg. 74); that in 1900 he saw Mahaffey on the place; that he saw the cabin at that time and went into it and described the condition of the cabin (Tr. pg. 75); that passing on the road he would see Mahaffey on the place (Tr. pg. 78); but he was unable to give any idea of the number of times he passed the place or during what years (Tr. pg. 78); that after he purchased the land for his son he was not down on the place for a long time, two or three years (Tr. pg. 79); that when he finally did go down he found the same cabin that was there when he was on the place in 1900 (Tr. pg. 79).

William Kirkland testified that from 1900 to 1910 or 1911 he was in the employ of Frank D. Cooper; that he was at the cabin on the place but could not remember whether it was in the spring of 1904, but thought it was before that (Tr. pg. 93); he described the condition of the cabin (Tr. pg. 93); that he did not say Mahaffey lived there at that time and that he never did see Mahaffey on the land (Tr. pg. 93).

Richard T. Loss testified that there was a cabin on the place which was daubed or pointed up with a stove pipe through the roof and with a window and a door in it (Tr. pg. 94-95); on cross-examination he testified that from the time Mahaffey filed on the land

up to the time he made final proof witness was across the land several times (Tr. pg. 95); on further cross-examination stated that he was there two or three times (Tr. pg. 95); and finally admitted that he really was only by the place twice (Tr. pg. 95); and that both of these times was in 1903 or 1904, before Mahaffey made final proof, and that he saw Mahaffey there twice (Tr. pg. 95); that he saw Mahaffey around but did not pay much attention to him and was not down to the cabin (Tr. pg. 95).

Charles Wise testified that he had been on the land but could not remember the date (Tr. pg. 96); that he saw Mahaffey living on the land (Tr. pg. 96); that he was on the land three or four times altogether while he was living there, all of these visits being in one year; that he stayed there about a week or five days altogether, ate there and slept there (Tr. pg. 96); that there was a reservoir on the land and that he worked on it, helped on it three or five days (Tr. pg. 97). On cross-examination the witness stated that all of his visits were made during one year and it seemed to him like it was 1905 (Tr. pg. 97); that he was there perhaps a half dozen or three or four times that year, and that it was along in the fall when he was there (Tr. pg. 98); that he thought it was after he made his final proof that he was there (Tr. pg. 98).

Charles Wise was one of the final proof witnesses for the entryman Mahaffey (Tr. pp. 65-67); and in that affidavit and deposition the witness testified that

Mahaffey in June, 1899, settled, built the house and commenced residence on the land (Tr. pg. 66); and that Mahaffey had lived on the land since June, 1899 (Tr. pg. 66); and that Mahaffey had not been absent from the land (Tr. pg. 67).

Now if the witness Wise testified to the truth on the trial of this case, all of his visits were during one year, which he thought was in 1905, and after Mahaffey made final proof, and he could not and did not know when Mahaffey built his cabin, or when he settled upon and commenced to reside on the land, or that he had resided continuously thereon and had never been absent therefrom. If the testimony which this witness gave on the trial of this case was true then the testimony which he gave as a final proof witness was false, or, to say the least, he testified positively to facts regarding which he had no knowledge whatever.

It may be contended that Wise was mistaken as to the time he was on the land and helped construct the reservoir, and which he fixed as being in 1905 as he thought. If he was ever on the land at any time it must have been 1905, and after Mahaffey had made his final proof. The witness John Gardispee testified that the reservoir was built after he first saw the place and it must have been in 1904 or 1905 (Tr. pg. 50). Wise says he thinks it was after final proof and in 1905 he worked on the reservoir (Tr. pg. 97 and pg. 98). In the final proofs the claimant and his two witnesses were asked to describe the improvement

which had been made on the place and give the value of the same. The final proof witness Gilbert testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 64); the final proof witness Wise testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 67); while the entryman Mahaffey testified that the improvements consisted of a house, corral, land all fenced, improvements worth \$300.00 (Tr. pg. 69). Neither of the final proof witnesses nor the entryman described a reservoir as being among the improvements placed on the land, and certainly if the reservoir had been constructed at that time it would have been included among those improvements. Possibly, of course, one or both witnesses might have failed to mention it, but certainly the entryman himself would have included it. And in view of this final proof testimony the testimony of Wise fixing the time as being in 1905, when he was on the land, must have been correct.

The witness Frank D. Cooper testified that he saw the cabin in 1900, the witness Kirkland testified that he thought it was before 1904 that he saw it, the witness Loss testified that he was past the land twice in 1903 and 1904 and saw the cabin, while the witness Wise testified he saw the cabin several times all during one year which he thought was 1905, after Mahaffey had made final proof, and all of these witnesses testified that the cabin had doors and windows and was chinked or daubed up, some of them testify-

ing that it had a floor in it. Yet when the witness Bennett examined the cabin in July, 1909, it had no floor, was not chinked up, had no door or window and no door or window casings, and that he could not find, on examination, an evidence that there had ever been any door or window in it. His evidence corroborates the evidence of Frank Kinsey who testified that before Mahaffey made final proof he examined the cabin and could find no evidence that there had ever been any door or window in it (Tr. pg. 57). Certainly if, as late as 1904 or 1905, there had been a floor in the cabin, door and window casings and a door and window in it, and it had been chinked and daubed up there could not possibly have been such a change in the cabin between those years and 1909, when Bennett examined it, as Bennett found on his examination. There would have been some evidence in the logs or nails or nail holes used to fasten in the door and window casings and the doors and windows. The door and window casings and the doors and windows might have been removed and taken away and the nails which fastened them in might have been pulled out, but the nail holes would have remained. Cooper testified that "There is none of these places unless you have a man on them that would remain the same. They would soon carry it off. There was not a place but what I had some trouble with it. Everything was practically taken off except the house." (Tr. pg. 84). And while it is possible that in that particular neighborhood the residents may

have been extremely light fingered and would steal everything that was not nailed down and many things which were nailed down, yet it is going just a trifle too far to ask us to believe that in this particular instance they even stole the nail holes out of the logs. And it is exactly the same with reference to the floor in the cabin. If there had ever been a floor in it and had been removed, certainly in 1909 there would be some evidence that the floor had been in the cabin at one time and had been removed. And with reference to the chinking between the logs, if it had been chinked up as late as 1904 or 1905 so as to render it habitable, all of this chinking would not have entirely disappeared by 1909, leaving no evidence whatever behind that it had been chinked at one time.

The evidence of the two Gardispees and the two Kinseys as to the condition of the cabin prior to and at the time final proof was made, as corroborated by the evidence of Bennett, which is not disputed or contradicted in any manner whatever, shows clearly that the entryman Mahaffey was not living in the cabin, and that it was not, at the time the entryman made final proof, and never had been, prior to that time, in a habitable condition or fit to be used for living purposes, and there being no other buildings on the place, he could not have resided on the land continuously from June, 1899, up to the time of making final proof.

Considering all of the testimony introduced on the trial of the cause with reference to the condition of the cabin on the land and the entryman's residence

on the land, we have, on one side the testimony of the two Gardispees, who lived within two or three miles of the land and knew the land and cabin from April, 1902, who were on the land every few days, and who testified as to the uninhabitable condition of the cabin during all of that time, and who, although on the land and at the cabin frequently during those years, never saw Mahaffey on the place; the testimony of the two Kinseys who lived between one and two miles from the land and knew the land and cabin from the first part of April, 1904, who were on the land and at the cabin many times before final proof was made by Mahaffey, and who testified as to the cabin being without doors, windows or a floor, and who, in all of their visits to the land, never saw the entryman on it; and the testimony of Bennett, which corroborates the testimony of the two Gardispees and the two Kinseys regarding the condition of the cabin. On the other hand we have the testimony of Frank D. Cooper who was at the cabin one time between 1899 and 1906 or 1907; the testimony of Kirkland who was at the cabin one time between 1899 and 1904, but never did see the entryman on the land; the testimony of Loss who was past the land twice in 1903 or 1904; and the testimony of the witness Wise who testified that he was on the land several times, all during one year which he thought was 1905, and whose testimony is discredited by the testimony given by him when he was a final proof witness.

We submit that, taking into consideration the

number of times the various witnesses were on the land, their opportunities for observing the condition of the cabin, their opportunities for seeing the entryman if he was residing on the land, the testimony of the witnesses, the two Gardispees and the two Kinseys, when corroborated by the testimony of the witness Bennett as to the condition of the cabin, shows conclusively that the cabin on the land had never been placed in a habitable condition and that the entryman Mahaffey never did reside on the land.

With reference to the enclosing of the land with a fence by the entryman the evidence was, in substance, as follows:

The witness W. L. Kinsey testified that the land was all open so that stock ranged across it and he rode back and forth over it frequently looking for stock, and that the only fence was on the east side on the Cooper land (Tr. pg. 46).

The witness John Gardispee testified that between April, 1904, and the middle of June, 1904, no fencing was done on the place (Tr. pg. 46); that his stock ran right across the range right in there (Tr. pg. 46); during that time he could cross back and forth over the land while driving stock and that his stock ranged across it at that time (Tr. pg. 46).

The witness John Gardispee Jr. testified that there was a fence on the east side of the land (Tr. pp. 50-51); that he was across the land hunting horses and cattle which ran in there quite a lot (Tr. pk. 51); that for two or three years after 1902, he knew of only one

fence, the north and south line fence on the east side (Tr. pg. 51); that there was no fence enclosing it so as to keep stock out, it was open so that stock would range all over it (Tr. pg. 51).

The witness Frank Kinsey testified that before final proof was made he never saw any improvements on the land except the cabin, no other buildings, fencing or corrals of any kind (Tr. pg. 57); that he was back and forth over it while hunting stock, it was all open range (Tr. pg. 57); it was so open that stock of all kinds ranged back and forth across the land (Tr. pg. 57-58);

The witness Frank D. Cooper testified that Mahaffy told him he was going to fence the land and wanted to know if he could join his fence on the end, that is the east end, that would be eighty rods, and the witness finally sold him forty rods of fence for thirty-five dollars (Tr. pg. 75); that he didn't go around to see how much he had fenced or what he had made in the way of fences in addition to that he bought (Tr. pp. 79-80); that when the land was purchased it was not enclosed (Tr. pp. 83-84); that the witness did not remembr whether or not he built the fence after the land was purchased (Tr. pg. 84).

The witness William Kirkland testified that there was a fence on the east side of it and that was all the fence he ever noticed (Tr. pg. 91); that he saw a fence running in the other direction, but as to that being Mahaffey's fence he could not say (Tr. pg. 91).

The witness Richard T. Loss testified that there

was a fence on the east side of the land and other fences there, but that he did not pay any attention to them (Tr. pg. 95); that there were no fences running at right angles to the fence on that side (Tr. pg. 95).

The witness Charles Wise testified that there was some fence there, but not a great deal, and that he never went around it, and did not notice any fence running across from the east fence (Tr. pg. 97). The witness Wise, when a final proof witness, testified that the land was all enclosed with a fence (Tr. pg. 67). He now testifies that while there was some fence there it was not a great deal and he never went around it and never noticed any fence running across from the east fence. If the testimony of the witness given on the trial of this case was true, then as a final proof witness he testified to facts regarding which he had no knowledge whatever.

The witness Bennett, who as a Special Agent of the General Land Office, testified that when he made his examination in July, 1909, he found the land enclosed with land belonging to the witness Frank D. Cooper, the father of the intervenor (Tr. pp. 55 and 56).

The testimony of the witnesses the two Gardispees and the two Kinseys was direct and positive that the land was not enclosed with a fence and that the only fence was on the east side on the land belonging to the witness Frank D. Cooper, that the land was all open range across which stock of all kinds ranged at

all times. This evidence is not contradicted by any of the witnesses for the intervenor, but is corroborated by the evidence of some of them, namely Kirkland and Loss.

In his final proofs the entryman Mahaffey could not and did not attempt to show any cultivation of the land, but based his right to receive a patent on the fact that the land was grazing land and that he had used it for such purpose.

If the land was not enclosed so as to exclude and segregate it from the public range, and the evidence clearly shows that it was not, then the entryman, while he may have permitted his stock to graze on the land, permitted them to do so in common with other stock belonging to other persons, and the use of such land was not restricted to his own stock but was at all times part of the public domain and public range. And the entryman by failing to either cultivate the land or to enclose the same and use it for grazing purposes, excluding and segregating it from the public range, wholly failed to comply with the homestead laws, and his proofs were false and fraudulent.

We therefore, respectfully submit that the evidence was and is sufficient to sustain the allegations of the bill of complaint, and shows that the entryman Mahaffey did not comply with the homestead laws, either as to residence upon or use of the land, and that his final proofs were, therefore, false and fraudulent, and the court erred in holding and finding that

the evidence was insufficient to sustain the allegations of the bill of complaint.

The remaining question to be determined is whether or not the Intervenor was a purchaser in good faith for a valuable consideration; that is, whether he purchased without notice or knowledge of the fraud perpetrated by the entryman in acquiring the land.

In the bill of complaint the Intervenor was not made a party defendant, but after the action was instituted appeared as an Intervenor, setting up in his answer in intervention by way of defense to the cause of action contained in the bill of complaint, the fact that he was a purchaser in good faith, for a valuable consideration and without notice of any fraud committed by the entryman, and without notice that the complainant claimed that the entryman had committed fraud in the acquisition of the land.

The burden of proof was on the Intervenor to show that he purchased in good faith and paid a valuable consideration for the land.

“The burden was upon him to produce satisfactory proof that he purchased in good faith and paid value. His testimony that he ‘purchased that land in good faith’ and paid a ‘money consideration’ does not constitute such proof. Nor is the recital in his deed of the payment of a money consideration sufficient proof.”

Cooper v. United States, 220 Fed. 871. (CCA 9th Circuit).

The testimony shows that the intervenor was, at the

time of the purchase and the execution of the deed by the entryman Mahaffey, eleven or twelve years old (Tr. pp. 85 and 90); that the witness Frank D. Cooper was his father and made the purchase for the intervenor and that the intervenor had no knowledge of the purchase of the land until after it had been fully consummated, Frank D. Cooper carrying through and completing the entire transaction for the intervenor and without his knowledge until after the transaction was entirely closed up and completed (Tr. pp. 76, 81, 83, 88, 89, 90).

The father of the intervenor, Frank D. Cooper, having acted as his agent and representative in the purchase of the land, the burden of proof was on the intervenor to show that Frank D. Cooper made the purchase in good faith and for a valuable consideration.

The Frank D. Cooper, father of the intervenor, and a witness in this case, is the same Frank D. Cooper who was a party to the two actions reported in 220 Fed. at pages 867 and 871.

The testimony on the part of the intervenor is, with reference to the purchase of the land by Frank D. Cooper for the intervenor, in substance, as follows:

The witness Frank D. Cooper testified that the first conversation he had with Mahaffey with reference to the purchase of the land was at Cascade on June 15, 1904 (Tr. pg. 76); Mahaffey did not want to sell the land to him, but to his son the intervenor

(Tr. pg. 76); said he wanted to sell out to Nelson and wanted \$350.00 (Tr. pg. 76); witness studied a while and finally, having Nelson's money, invested it for him, and made out a check for him for \$300.00 and Mahaffey gave the witness a deed to the intervenor (Tr. pg. 76); that previous to that time the witness had bought other lands of like character in that vicinity, from time to time, and also bought some Northern Pacific land (Tr. pg. 77); that at that time he had very little knowledge of the Mahaffey land (Tr. pg. 77); that witness owned the land adjoining the Mahaffey land on the east (Tr. pg. 80); that witness had purchased lands from homesteaders in that vicinity, and also some from the Northern Pacific Railroad Company (Tr. pg. 81); that during the time witness was there he had acquired about nineteen thousand acres (Tr. pg. 81); a large amount was purchased from homestead entrymen after they had made final proofs (Tr. pg. 81); Mahaffey wanted the intervenor to purchase it (Tr. pg. 81); the purchase was actually made and deed delivered on June 15, 1904, the same day that he made his final proof (Tr. pg. 81); witness did not know whether or not Mahaffey knew Nelson had any money (Tr. pg. 81); prior to that time the witness had never purchased any lands for the intervenor (Tr. pg. 81) that witness was on the Mahaffey place in 1900, and may have been over the land before that, but not anyways soon (Tr. pg. 82); that he knew the land all around there in a general way and thought that between 1900

and the time he bought the land he was there, but was not positive and did not remember seeing him (Tr. pg. 82); that witness knew all of the land over in that country (Tr. pg. 82); knew the general character of the land, knew it in a general way (Tr. pg. 82); that he never went to examine any of the lands he bought (Tr. pg. 82); knew the general character of the land and knew it in a general way (Tr. pg. 82); that he never went to see any of the land he bought, never saw a piece of it (Tr. pg. 82); that he never examined any land of all the land he bought, but knew the general character of all of it (Tr. pg. 82); after the land was purchased it was used in common with the other land owned by the witness (Tr. pg. 83); used practically the same as his other lands (Tr. pg. 83); that when it was purchased it was not enclosed (Tr. pg. 84).

From the evidence introduced by the intervenor on the point, we find the following conditions existing at the time the witness Frank D. Cooper purchased the land taking the deed in the name of the intervenor: Frank D. Cooper had lived in that neighborhood for a number of years, he had acquired about nineteen thousand acres of land, a large portion of it being purchased from homesteaders, after they had made final proofs, and some of his land adjoining the land of the entryman Mahaffey; the land was purchased on the same day that Mahaffey made final proof; that Mahaffey asked the witness Cooper to purchase the land for the intervenor although Mahaffey did not know

that witness Cooper had ever theretofore purchased any land for the intervenor who was only eleven years of age; that the witness never examined any of the land he purchased before purchasing it, going ahead and purchasing it without knowing the kind of improvements or the value of the improvements which had been placed on it; that he knew at the time he purchased it that it was not enclosed with a fence (Tr. pg. 84), and that consequently he must have known that the entryman had not complied with the homestead law.

The evidence shows that Frank D. Cooper was a man of large affairs, that he was all over that particular country more or less, all of the time, looking after his sheep and other interests. It is not reasonable to suppose that such a man would go ahead and buy a piece of land for his son when he knew practically nothing about the land, or the improvements thereon, and particularly when the entryman offered the land for sale on the very day he made his final proof, which fact alone should have been sufficient to have placed a prudent man upon inquiry.

The evidence shows that some of Frank D. Cooper's land adjoined this very tract of land and that he had some sheep pens on this tract of land (Tr. pg. 47, W. L. Kinsey, and pg. 50, John Gardispee); and that Cooper's men were working there with a foreman (Tr. pg. 47); that in April, 1904, Mahaffey was working for Frank D. Cooper (Tr. pg. 46); that John Gardispee Jr. had seen him on Cooper's place

cooking several times (Tr. pg. 52); and that Frank Kinsey had seen Mahaffey in the spring of 1904 working for Cooper at his sheep camp about one-half or three quarters of a mile east of the Mahaffey land (Tr. pg. 58).

In the case of Cooper vs. United States, 220 Fed. 867, the appellant Cooper, being Frank D. Cooper, witness and father of the intervenor in this case, purchased the land from the entryman on the same day on which the entryman made final proof, and the facts and circumstances as shown by the evidence in that case, being so nearly identical with the facts and circumstances proven in this case we believe that the argument contained in the appellee's brief in that case is particularly applicable here and we therefore quote therefrom the following:

“Appellant seems to argue that because he purchased this land from Gilbert without any knowledge that the United States claimed that Gilbert had not complied with the law that he is an innocent purchaser for value. But a man cannot sit idly by and live in the neighborhood of a piece of land from 1876 to 1904, the time when final proof was made and the land bought by him, and say that he was innocent of what Gilbert had done. A man cannot close his eyes, as Cooper desires this court to believe he did, and then profit by his endeavors to notice nothing. He must have known on July 15, 1904, when he purchased the land, that Gilbert had worked for him herding sheep for several years prior there-

to, and knowing that Gilbert was so in his employ, he, an experienced sheepman, knew that Gilbert did not herd sheep at some remote portion of Cooper's 21,000 acres and return to the claim every night, or even maintain a 'continuous residence' for five years as the law required a homesteader to do. It was not incumbent upon the United States to notify Cooper, or anyone else, that it would insist on a cancellation of the patent within the statutory period, if it discovered that Gilbert had practiced a fraud in making his final proof. Indeed, Cooper was so anxious to secure this land that he could not wait until a patent had issued for it, but purchased it July 15, 1904, less than thirty days after final proof was made and five and one-half months before patent issued. It is absurd to say that a man who owns a large tract of land, 'a man of large affairs,' is by reason of that fact not expected to know what is being done with a piece of land, over which he built a road and in whose service the entryman had been engaged for several years prior to the final proof and purchase."

"The mere fact that the title he bought was nothing but one based on a final receipt issued less than thirty days before the purchase was a thing that should have put him upon inquiry and if he neglected to inquire into the bona fides of the entry his neglect is no protection to him. His 'large affairs' and enormous land holdings alone show that he was a man well versed in the ways of the world and particularly with all of the details of acquiring the public domain. Cooper's pretended ignorance of what Gilbert had done on the claim and lack of knowledge as to what residence a man had in such close proximity for a

period of over five years is a circumstance in itself that brands Cooper with a guilty knowledge of the fraud."

And we also desire to quote from the appellee's brief filed in the case of Cooper vs. United States, 220 Fed. 871, as follows:

"It seems incredible that a man of Cooper's business ability should have so conducted himself in and about the purchase of land that he would purchase even one hundred and sixty acres of grazing land without at least remembering whether he had ever seen it prior to such purchase. He testified that he lived in the neighborhood from 1876 to 1910 and in all but three years of such time had had a homestead in said township with the claim under consideration. His ownership of 21,000 acres of land in the vicinity of this claim does not bespeak well for the truthfulness of his statements that he knew nothing about the Freeman entry before he purchased it. Is it possible that a man, who purchased such a vast tract of land as is shown by the record Cooper did, would pay two, four or six hundred dollars or more, without having examined any portion of it prior to paying the consideration therefor."

"In cases of this kind it is seldom, if ever, possible to secure direct proof of the fraudulent acts of a party, for from the very nature of the things, persons, who are engaged in the business of acquiring land from the United States and building up a vast domain such as Cooper had, do not work openly. On the contrary, such per-

sons are careful that no written evidence of their scheme to obtain the land is obtainable and no one except the entryman who is duped into taking up the land for a few paltry dollars is present. Indeed, it is remarkable that a man of apparently good standing in the community will go into the business of acquiring land, as Cooper did in the present instance, and, when the United States objects to its land laws being abused, protest that they have always been acting in good faith and are purchasers for a valuable consideration, when in truth, and in fact they have watched men like Freeman file upon claims and seen the land laws more honored in their breach than observance. The most unobserving persons in Cooper's position would have been compelled to notice that Freeman's entry was a sham and a fraud and, unless like Cooper, were desirous of acquiring it, would have denounced it for what it was a palpable attempt to defraud the government."

In the case of *Cooper vs. United States* in 220 Fed. 871, in which it was held that the defendant Cooper was not a purchaser in good faith for a valuable consideration, but purchased with notice of the fraud committed by the entryman, the purchase was made by Frank D. Cooper on July 15, 1904, the very same day on which he purchased the land involved in this action, in that case taking the deed in his own name, in this case taking the deed in the name of his son Nelson Cooper, the intervenor herein. It might also be ob-

served that Mahaffey, the defendant in this case, was one of the final proof witnesses for the entryman in that case, and that Wise, one of the witnesses in this case, was the other final proof witness in that case. And in the case of United States vs. Cooper, 220 Fed. 867, in which case it was also held that the defendant Cooper purchased with notice of the fraud committed by the entryman, final proof was made on August 18, 1904, and the land purchased by Cooper on the same day, just a month after the final proof and purchase in this case. And in that case Richard T. Loss and William S. Kirkland, who are witnesses in this case, were the entryman's final proof witnesses.

In view of the facts as disclosed by the evidence in this case, and all of the circumstances surrounding this case and the two Cooper cases hereinbefore referred to, it seems to us that there can be no question but what Frank D. Cooper not only knew of the fraud perpetrated by the entryman Mahaffey, but took the deed in the name of the intervenor for the sole purpose of concealing from the government the fact that he himself was the purchaser of this tract of land.

We therefore submit that the testimony was and is sufficient to sustain the allegations of the complaint and that the intervenor, instead of showing himself to be a purchaser in good faith for a valuable consideration, has shown that his agent and representative, Frank D. Cooper, at the time he made the purchase, had full notice and knowledge of the fraud of the en-

tryman Mahaffey and the court erred in dismissing the bill of complaint and in ordering and entering the decree herein.

Respectfully submitted,

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No. 2738

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM A. MAHAFFEY,
Defendant,
NELSON COOPER,
Appellee.

BRIEF OF APPELLEE
NELSON COOPER.

JAMES A. WALSH,
Solicitor for Appellee.

IN THE
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM A. MAHAFFEY,
Defendant,
NELSON COOPER,
Appellee.

BRIEF OF APPELLEE,
NELSON COOPER.

STATEMENT.

This action was prosecuted by the Appellant against William A. Mahaffey for the purpose of cancelling a patent to certain lands.

The bill of complaint contains the stereotyped allegations in such cases, alleging that Mahaffey on April 27th, 1899, made a homestead entry upon the lands in question, (Tr. p. 3), and that on the 23rd day of June, 1904, he made final proof, and on the 31st of December, 1904, a patent was issued to him. (Tr. pp. 8-9.) Mahaffey could not be found within the jurisdiction of the Court,

and thereupon an affidavit for an order of publication was made and filed (Tr. pp. 18-19-20) and an order was issued and served by publication. (Tr. pp. 21-22-23.) An order was entered against him pro confesso, (Tr. 24-25.)

The appellee filed a Petition in Intervention, (Tr. pp. 25-29) and was allowed to intervene. Thereupon the intervenor filed his answer in which he denied the general allegations of fraud contained in the complaint, (Tr. pp. 31-33) and further answering alleged that after the making of said final proof by Mahaffey, the appellee in good faith, and without any notice or information that Mahaffey had not complied with the laws of the United States, and for a valuable consideration paid by him purchased the said lands from the said Mahaffey, and a deed of conveyance was executed, conveying said lands to the appellee; that said deed was executed and the money paid in good faith, and that he did not have any notice that Mahaffey had not complied with the law, or that the complainant claimed that any fraud had been committed by said Mahaffey. (Tr. 33-34.)

The cause was tried before the Court, and the Court rendered a memoranda opinion, to which we would call the special attention of this Court, (Tr. pp. 38-42) and thereupon a judgment and decree was entered, dismissing the suit.

ARGUMENT.

There are only two questions presented in this case, viz: First: Did Mahaffey commit a fraud in procuring title to this land? and Second: Is the appellee an innocent purchaser in good faith, for value and without notice?

These are questions of fact. It may be said that there is not an issue of law involved in the case. The Judge who tried the cause, who saw the witnesses, heard their testimony, the manner in which they testified, and observed their demeanor on the stand, had a better opportunity to judge of the character and credibility of the witnesses than the Appellate Court has, who only has the printed transcript before it.

The homestead entry was made in April, 1899, and final proof was made in June, 1904. The witness Bennett did not see the land until 1909, five years after Mahaffey made final proof. His testimony can have but little weight and in fact does not very materially contradict the testimony of the witnesses on the final proof. (Tr. pp. 54-55-56.)

W. L. Kinsey and his son, Frank Kinsey never saw the land until 1904. It is apparent that the elder Kinsey is an amateur detective, and shows the special Agents of the Government around, keeps them at his place, and hires them his teams to use to look over lands. (Tr. p. 55.) Furthermore he had occasion to be active against Mr. Cooper because they "ranged him out." (Tr. p.

48.) His son, Frank Kinsey, did not become acquainted with the land until 1904, and he attempts to corroborate the testimony of his father.

The other witnesses by whom the Government sought to maintain its case were John Gardipee, Sr. and his son, John Gardipee (half Indian) Jr. Their testimony is to the effect that they never saw Mahaffey on the land, but they did not know the land prior to 1902. Their testimony is negative in character. It is unnecessary to follow the testimony of Appellant's witnesses and I will only quote the words of Judge Bourquin who heard these witnesses testify: "Such witnesses should not be used by any one, especially by the Government."

Turning now to the testimony of the appellee; His father, Frank D. Cooper, is a man of some standing in the community in which he lives, has been a member of the Legislature, and a County Commissioner of one of the most populous and wealthy counties of the State, Cascade County. He saw Mahaffey on the land in 1900. He was in the cabin and saw such furniture as is usually in a bachelor's quarters. He was there on horseback and went in to light his pipe. There was a board roof, and a floor in the house, and he sold Mahaffey forty rods of his fence to be used in inclosing the land. There was a reservoir and a ditch on the place. This land was about seven or nine miles west of Cooper's home, and Cooper saw Ma-

haffey frequently passing, going to and returning from the direction of this land. (Tr. 74.)

Nelson Cooper, the Appellee, who was at that time a mere boy, was acquainted with Mahaffey. He knew that there was a reservoir on the place, and the boys used to go there to swim. (Tr. pp. 88-89.)

William Kirkland, who had charge of one of Cooper's outfits, knew the land; the house was plastered; he saw a stove pipe through the roof, and saw the reservoir and a ditch, and saw a fence on the east side. (Tr. p. 91.) Mahaffey worked for Kirkland a short time in the spring of 1904. He hired him and paid him off. (Tr. p. 92.) If he wanted he could go to his place nights and return in the morning, and he noticed him passing to and from his place. (Tr. p. 92.)

The Government attempts to bolster up its case by trying to show that Mahaffey worked for Cooper, but this is mere hearsay, or was evolved in the brain of some of the witnesses. Cooper denies that he worked for him, and Kirkland shows that he only worked a short time in 1904. It is shown by the testimony of Loss that whatever work Mahaffey did was on the N. S. Ranch. (Tr. 94.)

Loss was on the land, saw a cabin "daubed or pointed as they call it," with a board roof, and saw a stove pipe through the roof and a door and window in the house. There was a reservoir and ditch there. It was as good as the ordinary

homestead in Montana. Mahaffey stayed on the ranch and took care of stock in the winter. He was considered a pretty good man, (Tr. 94-95).

Charles Wise was on the place and saw the log cabin. It had a door and window. He stayed there four or five days, and ate and slept there. Mahaffey had a bed, table and one chair, and a place fixed up for dishes, bachelor-like. The cabin was plastered, and there was a stove pipe through the roof. There was a corral there, and he helped to build the reservoir. (Tr. pp. 96-97.) Wise is an old man, and in cross-examination got a little mixed on his dates and said he did not know the year it was, but thought it was 1905. It is clear that Mahaffey did not build the reservoir after he had made final proof and sold the land; and that it was prior to that date that Wise helped him build it, and stayed on the place with him.

It is thus shown by positive testimony that Mahaffey did comply with the provisions of the Homestead Act. This testimony is sought to be overcome by the testimony of Bennett, who never saw the land until 1909; the testimony of the two Kinseys who never saw the land until 1904, and who only testified that they never saw Mahaffey on the land; and the testimony of Gardipee and son who never saw the land until 1902, and whose testimony is merely negative. The testimony of such witnesses, with their limited chances for observation, is not entitled to any weight.

The Government has signally failed to estab-

lish its allegations of fraud. The testimony of its witnesses, witnesses who are not entitled to much credit, is negative in its character. As the Court said: "Their testimony is negative; their opportunities for observation few; their recollection poor; their testimony hesitant and drawn out, modified, strengthened and shaped by leading questions. Little credibility and weight can be given it in the main." (Tr. p. 39.)

I regret that I did not insist on having the entire testimony, question and answer, incorporated in the bill of exceptions so that this Court might see the labored efforts of Counsel to bring out the testimony of the witnesses to sustain their case.

The Appellant failed to establish fraud by clear and convincing evidence that is required in such cases.

"Parties are presumed to be free from fraud until the contrary is proved, and the burden rests upon him who asserts fraudulent conduct, to make good the charge by *clear and satisfactory proofs*."

Jones on Evidence, 192.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves

the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this it attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice: but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful."

This language was quoted with approval in the case of *United States vs. Budd*, 144 U. S. 154.

Applying this test, the complainant's testimony falls far short of making out a clear and convincing case of fraud.

In *United States vs. Stinson*, 197 U. S. 200, the Court said:

“While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof.”

“Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. ‘It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.’”

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Further:

“But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect.”

These quotations are supported by numerous decisions of United States Supreme Court cited in

the original opinion, which we think unnecessary to cite here.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

“The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided.”

See also Colorado Coal & Iron Company vs. United States, 123 U. S. 307.

THE APPELLEE IS A PURCHASER IN GOOD FAITH, FOR VALUABLE CONSIDERATION, AND WITHOUT NOTICE.

The Appellee was twenty-three years old at the time of the trial of this case. (Tr. p. 88) He was, therefore, twelve years old at the time this land was bought.

The Appellee was named after H. H. Nelson, one of Cooper's neighbors, who gave him One hundred Dollars, (\$100.00), (Tr. p. 78). This money was used and calves bought with it at times, and at this time Nelson had to his credit from that money, the sum of about Three Hundred Dollars, (\$300.00) (Tr. p. 79). Nelson made One hundred Dollars at one time in buying some calves. (Tr. p. 89.)

The elder Cooper met Mahaffey at Cascade, and Mahaffey wanted to sell the land to Nelson (Tr. p. 76). Mahaffey and the boy were "chummy," and it is not unreasonable to suppose that Mahaffey wanted the boy to have the land. (Tr. p. 88.) Mahaffey wanted Three hundred fifty Dollars, (\$350.00) for the land, and wanted to sell it to Nelson. They finally agreed upon Three hundred Dollars, (\$300.00) and Mahaffey was given a check for that amount, (Tr. p. 76) and a deed of conveyance was executed. That is all the land was worth. Cooper had bought a considerable quantity of Northern Pacific land for One dollar and a quarter, (\$1.25) an acre, of the same character as the Mahaffey land, and all around in that locality. The Mahaffey land was in a little canyon, rocky on both sides and would not average as good as the railroad land bought at \$1.25 an acre, and the Mahaffey land was not worth more than Three hundred Dollars. (Tr. p. 77.) The Government did not attempt to prove that the land was worth any more, so that it is conclusively proven that appellee paid all the land was or is worth.

It is contended that the elder Cooper had notice that Mahaffey had not complied with the law. But this evidence is negative in its character and the testimony of "such witnesses" as "should not be used by any one, especially not by the Government," and even this testimony was "drawn out, modified, strengthened and shaped by leading

questions.” The witnesses were willing to testify, but they did not know just what testimony was needed.

What is the evidence to show that the elder Cooper had any knowledge that Mahaffey had not complied with the law?

Kinsey said that Mahaffey worked for Cooper, but he only knew what he heard (Tr. p. 46) and that Cooper’s place was four miles southeast from Mahaffey’s place (Tr. p. 46).

Gardipee Sr. (erroneously spelled “Gardispee” in the transcript) did not testify as to any knowledge on the part of Cooper. Neither did Gardipee Jr.; Bennett knew nothing about it, nor did Kinsey Jr.; so there is no evidence whatever to show that Frank D. Cooper had any knowledge of the conditions of the land at the time he bought it, or that Mahaffey had not, in all things complied with the law, or that it was claimed on the part of the Government that he had not. In fact it is shown affirmatively that the elder Cooper acted in good faith and that he paid all the land was worth.

The quotation from 220 Fed. 871, on page 30 of Appellant’s brief does not touch the issues in this case. As I stated, there is practically no question of law involved. It is a question of fact and the quotation made does not fit the facts in this case.

The appellant has proved that he purchased the land in good faith; that he had no notice of

fraud or claim of fraud on the part of Mahaffey; he proved that he paid value, Three hundred Dollars; he proved that the land was not worth any more, and that lands all around it, better lands, had been purchased for less money.

The Appellant did not attempt to rebut or discredit this testimony, and did not introduce any evidence whatever upon the subject. Therefore it must be taken as true that the land is not and was not worth any more, and it is proved beyond a question that Cooper paid Three hundred Dollars for the land.

The fact that the elder Cooper may have had some sheep pens some place near this land is not proof that he knew of the conditions of this land, if the conditions claimed by the Appellant existed. The elder Cooper is a man of large affairs. He does not look after all details of his business personally. The witness Kirkland had charge of the sheep camp in that vicinity, and there is not one scintilla of proof showing or tending to show that Cooper ever was at that sheep camp, or that he had any knowledge of the condition of the Mahaffey land, excepting what is shown by his own testimony.

The evidence that Mahaffey worked for Cooper is so flimsy and unreliable that it is difficult to discuss it with patience. The testimony of Kirkland is conclusive on that point; that Mahaffey worked under Kirkland's supervision a short

time in the spring of 1904 (Tr. p. 92). It is quite probable he reported that to Cooper when he settled with Cooper, but Cooper did not testify that he knew anything about that.

The testimony of Frank Kinsey was that Mahaffey worked for Cooper in the spring of 1904 "I think", he does not say how long. In fact he did not know.

Gardipee only knew what he heard. (Tr. p 46.) John Gardipee Sr. says he saw him working for Cooper about three miles from the Mahaffey place. (Tr. p. 50.)

And this is the kind of flimsy evidence that the Government would use, and upon which it bases its claim to take this land away from this boy.

It is contended that F. D. Copper was the agent of the Appellee Nelson Cooper. Nelson Cooper was eleven or twelve years old at the time the land was purchased, and was legally incapable of employing an agent or being bound by his acts.

It is not necessary to cite authorities in support of this proposition. It is elementary.

Mahaffey left the country and his present residence is unknown.

If this patent is cancelled, Nelson Cooper will lose the land, will lose his money and Mahaffey cannot be found so that Nelson will not have recourse on anybody to recover the money paid for the land.

It may be contended that he might recover it from F. D. Cooper. Under the evidence in this case, I contend that he cannot.

However, it is not necessary to discuss that question in this case.

I respectfully submit that the Appellant has failed to establish any fraud on the part of Mahaffey, and as to the witnesses, "Their testimony is negative, their opportunities for observation few, their recollection poor, their testimony hesitant and drawn out, modified, strengthened and shaped by leading questions. Little credibility and weight can be given it in the main." "Such witnesses should not be used by any one, especially not by the government."

On the contrary, the testimony of the appellee's witnesses, witnesses who have some standing in the community in which they live, men of families, is positive and direct, and shows that no fraud was committed by Mahaffey; that he acted in good faith, and "was considered a pretty good man in the community."

The Appellee assumed the burden of proof, and established by undisputed evidence that he was a purchaser of the land in good faith, without notice of any fraud on the part of Mahaffey or claim that he had committed fraud; and that he paid in money, or by check, which is the same as money, the full value of the land.

I respectfully submit that the judgment of the

lower Court is in all things correct, and is supported by evidence beyond a reasonable doubt, and should be in all things affirmed.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellee.

